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BEYOND LAW REFORM: GETTING THE ADMINISTRATION OF CRIMINAL JUSTICE ACT, 2015 TO WORK FOR SUSPECTS IN NIGERIA

By

Stanley Ibe^{*1}

Abstract

This paper examines Nigeria's "revolutionary legislation," the Administration of Criminal Justice Act ("ACJA"), in a context where new laws do not necessarily translate to tangible outcomes. Indeed, it argues that law reform, without more, cannot transform any system. As might be expected, it begins by engaging the debate why so many reform initiatives do not live up to their promise in Nigeria. The answer lies somewhere between the structure of federalism we operate and the lack of coordination of efforts in the past. In engaging ACJA, an effort is made to identify what is new and different, namely important safeguards, including detention time-limits (maximum of 28 days); abolition of unlawful but prevalent practices such as arrest for a civil wrong; and mandatory record keeping to promote accountability in the system. Given that reforms operate within a specific context, the paper argues that the current government's campaign against corruption and the monitoring mechanism established under ACJA offer critical opportunities for implementation but cautions of challenges to overcome to guarantee some modicum of effective implementation, including the perennial politics of faulty federalism; capacity and infrastructure deficits and corruption. Finally, the paper recommends public information about

*. The Author wrote a substantial part of this paper during his time as a Reagan Fascell Democracy Fellow at the National Endowment for Democracy, Washington DC (October 2016 – February 2017). He gratefully acknowledges the support of Sally Blair (Senior Director, Fellowship Programs) and Zexxes Spencer (Senior Manager, Fellowship Programs) at NED.

1. LL.M (Maastricht). The views expressed in this article are personal to the author. They do not represent the opinions or policies of the Open Society Foundations or any of its associated programmes.

the existence and provisions of ACJA; strengthening of existing oversight mechanism to keep institutions in check; and crucially a review of similar effort in Lagos under its 2007 law with a view to learning lessons with which to enhance the experience at the federal level.

1. Introduction

Although there has been a lot of investment in the criminal justice system,² not much has been achieved in terms of tangible outcomes. There are a few reasons for this.³ One is the type of federal structure Nigeria operates. There is a federal police institution,⁴ which is the gate keeper to the system. It serves institutions such as the judiciary and prosecutors departments – at federal and state levels.⁵ The prisons, which serve as receptacles for convicts and suspects alike fall under federal control. Ordinarily, this should not be a problem given that “criminal law” is an item under the concurrent legislative list (meaning that federal and state government can make laws with respect to criminal law).

However, it is a major problem because these institutions do not necessarily coordinate with one another.⁶ Indeed, they often owe

2. Investments in terms of human and material resources.
3. For more on this challenge, please see Ibe S, “Re-inventing Pretrial Practice in Nigeria: A Reflection on the Police Duty Solicitors Scheme,” *Nigerian National Human Rights Commission Journal* (December 2012) Vol 2, 186-203.
4. Section 214(1) of the 1999 Constitution establishes one “Nigeria Police Force.”
5. Most states have magistrate/area courts and high courts with criminal jurisdiction. The federal high court is also vested with limited criminal jurisdiction. The jurisdiction of each court is spelt out in its establishment legislation and/or rules.
6. Chidi Odinkalu describes the situation in these words: “With thirty six states and a federal capital territory, Nigeria has at least thirty-seven criminal justice systems, 36 of them belonging to each state and one federal criminal justice system. The architecture and mechanics of this network of institutions, powers and capabilities are quite complex. *Designed to work in unison for optimal outcomes, the various elements seem, in reality to be poised against one another in a relationship that assures non-performance and inaction.*” (Emphasis mine). See Odinkalu C. A., ‘Synergies, Networks and Not-works: Joined up Arrangements for Effective Criminal Justice Administration in Nigeria.’ Keynote Presentation to Workshop on Networking Criminal Justice organized by the Nigerian Institute of Advanced Legal Studies, (June 2012) (on file with author), p. 8.

allegiance to different levels of government to the detriment of the system.⁷

Another reason that we have not seen commensurate outcomes is that interventions in the sector do not necessarily connect⁸ so although there is a lot going on, they are happening in the context of silos thereby limiting overall outcomes and effectiveness. There has been one attempt in the past to provide a legal basis for coordination among government institutions in the field of Criminal Justice.⁹ Regrettably, it failed to gain traction for political reasons.¹⁰ There are a number of civil society coalitions in the sector but not much in

7 Chidi Odinkalu identifies five dimensions to the failure of synergies – (i) legal foundations are geriatric and ante-diluvian (ii) allocation of responsibilities among institutions of law enforcement is “very confused, confusing and lacking in coordination” (iii) crippling asymmetries in the distribution of procedural and substantive competences amongst courts, which allow for arbitrariness and non-performance (iv) absence of essential agency autonomy and independence and (v) absence of autonomous state level agency. See Odinkalu C. A. (n. 6), pp. 8-10.

8 See Ibe S, ‘Connecting the Dots: A Proposal for Linking up Early Access Projects in Nigeria’ in Legal Aid Council at 40 Years (Abuja: Legal Aid Council of Nigeria, 2016), pp. 174-183..

9 The Administration of Justice Commission Act is a 1991 decree which establishes an Administration of Justice Commission comprising the Chief Justice of Nigeria (as Chairman); Attorney General of the Federation; Minister of Internal Affairs; Inspector General of Police; Director of Prisons and President of the Nigerian Bar Association with the mandate to *inter alia* ensure that criminal matters are speedily dealt with; and the “relationship between the organs charged with responsibility for all aspects of the administration of justice is cordial and there exists maximum cooperation amongst the organs for effectiveness of the system of administration of justice in Nigeria.” The Act also establishes State Committees with similar functions. See Administration of Justice Commission Act, CAP. A3, Laws of the Federation of Nigeria, 2004.

10 There was some disagreement about the leadership of the Commission at the Centre. Therefore the government of the day discontinued scheduled inauguration. Nonetheless, there is at least one state – Ondo, where an ad-hoc committee was established along the lines set out in the Act with similar mandate.

terms of enduring government/civil society coordination mechanisms.¹¹

Although the challenges outlined dog the entire criminal justice process, it is important to clarify that this piece will focus on the pretrial side of the criminal justice chain. The decision to limit this exposition to early access is strategic. It is the entry point into the system and therefore has the greatest potential to prevent innocent people from falling prey to the delays inherent in the system. As I argued elsewhere:

...serious reform needs to start not at the end of the criminal justice process but at the beginning. We cannot reduce the ever escalating pretrial population unless we reduce the flow of detainees into the system.¹²

In reflecting on what the Administration of Criminal Justice Act¹³ has to offer in remediation of the challenge of coordination, we also interrogate essential provisions with respect to the pretrial phase of the criminal process with a view to gauging the potential impact of the reform measures proposed in the law. But this is not just about law reform. We also reflect on opportunities for implementation and challenges that must be addressed to translate the new law into tangible changes on the ground. Finally, we offer some ideas about connecting the dots between theory with practice.

11 As a result, the Open Society Justice Initiative supported the establishment of Legal Aid Providers Network in 2015 – bringing together Legal Aid Council of Nigeria and civil society organizations working in the field with a view to coordinating reform efforts, sharing information and networking for an improved legal aid system.

12 Ibe S, 'Why a Piecemeal Approach to Criminal Justice Reform in Nigeria Won't Work,' *OSF Voices*, April 5, 2013
<<https://www.opensocietyfoundations.org/voices/why-piecemeal-approach-criminal-justice-reform>> accessed 9 November 2017.

13 See Administration of Criminal Justice Act, 2015 in *Administration of Criminal Justice Act (ACJA) 2015 and Violence against Persons Prohibition Act (VAPPA) 2015* (Abuja: Nigeria Institute of Advanced Legal Studies, 2016), 16-345.

2. ACJA 2015 – A Revolutionary Legislation?

The Act has been described as a “silent revolution.” Indeed, the author who described it as such concluded that it:

...has the power to affect Nigerians in their day-to-day lives perhaps more than any other piece of legislation since the beginning of the fourth Nigerian republic on May 29, 1999.¹⁴

Another author¹⁵ describes the Act as introducing:

elaborate, innovative and revolutionary provisions aimed at promoting fairness, transparency, accountability and integrity of our criminal justice processes...¹⁶

These superlatives are accurate in view of the salutary provisions of ACJA. A review of some of the provisions relating to pretrial detention lends credence to this position. Prior to this review, it may be useful to provide a brief background to the twelve-year development trajectory of ACJA.

14 Olofinmoyin I., ‘The Silent Revolution: The Administration of Criminal Justice Act 2015,’ *The White Collar*. ThisDay Law. June 9, 2015, <<http://norfolk-partners.com/IDOWUPUB/The%20Silent%20Revolution%20the%20Administration%20of%20criminal%20justice.pdf>> accessed 9 November 2017.

15 Familoni A., ‘Understanding the new Administration of Criminal Justice Act, 2015,’ Paper presented at the annual general conference of the Nigeria Bar Association, Abuja, August 23-28, 2015 <https://s3-eu-west-1.amazonaws.com/nba-agc/papers/Sessions_Files/ACJ_Act_Session/Familoni+Paper+UNDERSTANDING+THE+NEW+ADMINISTRATION+OF+CRIMINAL+JUSTICE+ACT+2015.pdf> accessed 9 November 2017, 1-14.

16 *Ibid*, p. 1

2.1 Brief History of the Act

One of the architects of ACJA, Professor Yemi Akinseye-George has provided an interesting history of the Act. By his account,¹⁷ the National Working Group on the Reform of Criminal Justice Administration in Nigeria developed the first iteration of ACJA in 2005.¹⁸ Regrettably, the report of this group was not implemented until 2011, when the Federal Attorney General, Mr. Mohammed Bello Adoke decided to establish the Panel on Implementation of Justice Reform with a mandate to implement justice sector proposals from previous administrations. The Panel's work directly culminated in the ACJA.

2.2 Objectives of the Act

ACJA sets an audacious objective for itself:

To ensure that the system of administration of criminal justice in Nigeria promotes efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the defendant, and the victim.¹⁹

These are far-reaching objectives. Efficient management of criminal justice institutions is critical if the system will operate optimally. This author suggests that "efficient management"

17 Akinseye-George Y, "Summary of Some of the Innovative Provisions of Administration of Criminal Justice Act (ACJA) 2015 available at <http://www.censolegs.org/publications/6.pdf> accessed on 9 November 2017.

18 Former Federal Attorney General, Chief Akin Olujinmi, established this Working Group in 2003 to craft a new criminal procedure system. For more on the composition and work of this group, see Akinseye-George Y, "Keynote Address on the Administration of Criminal Justice Act" presented at the Conference on the Administration of Criminal Justice organized by the Nigerian Bar Association in Abuja on 9 November 2017. Paper is available at

<http://www.nba->

[acj.org.ng/index.php?option=com_content&view=categories&id=15&Itemid=275](http://www.nba-acj.org.ng/index.php?option=com_content&view=categories&id=15&Itemid=275) accessed on 9 November 2017.

19 Section 1(1)

includes mobilizing resources – human and material to achieve set goals within the shortest possible time. It should also extend to doing whatever is necessary to ensure that the system – not just the institutions, continues to function as a unit and produce expected result. This is a somewhat difficult task in a context where individuals and institutions are accustomed to working in their silos. It is however, achievable if the institutions commit to it and there is effective monitoring and oversight to ensure non-compliance attracts appropriate sanctions.

The second objective – promote speedy dispensation of justice – is equally important. Indeed, it is at the heart of the challenge with criminal justice administration in Nigeria. In the early stage of the criminal justice process, a lot of time is lost because several states – indeed 29 of 36²⁰ – still have criminal laws, which authorize magistrates to exercise unrestrained remand jurisdiction over cases they cannot try.²¹ Worse still, there are no time limits with respect to remand.²² Consequently, criminal suspects are remanded in prison indefinitely. This contributes to the high pretrial population and increases the duration of pretrial detention.

The final objective of ACJA bothers on protecting the society from crime and preserving the rights of suspects, victims and defendants. This is a delicate balancing act for any society in the world because crimes often occur and the society expects law enforcement institutions to protect law-abiding residents from criminal elements. However, there is a presumption that criminal

20 The seven states with similar criminal laws are Anambra (South East), Ekiti (South West), Enugu (South East), Kaduna (North West), Lagos (South West), Ondo (South West) and Oyo (South West).

21 This is the so called "holding charge." For more on the holding charge and its negative consequences for criminal justice administration in Nigeria, see Agbakoba O. & IbeS., *Travesty of Justice: An Advocacy Manual against the Holding Charge* (Lagos: Human Rights Law Service, 2004).

22 See IbeS., 'Making Legal Aid Work in Nigeria's Police Stations.' *OSF Voices*. November 7, 2012
<<https://www.opensocietyfoundations.org/voices/making-legal-aid-work-nigeria-s-police>> accessed 9 November 2017.

suspects are innocent of charges preferred against them until the state comprehensively establishes their guilt. The presumption presupposes that suspects shall be treated well. In a context in which society expects law enforcement to be hard on crime, it is difficult to walk the thin line between meeting societal expectations and staying within the ambit of the law but that is what law enforcement must do. How well or badly they do this determines the level of support and trust they will receive from the society. It is therefore imperative that law enforcement and other criminal justice institutions help members of the community to make sense of the often-difficult circumstances under which they operate by communicating properly and truthfully. This is the minimum requirement for accountability and transparency.

Taken together, the aforementioned objectives set the tone for and provide the benchmarks by which ACJA ought to be evaluated. Implementation should be designed to achieve these objectives in a progressive manner.

2.3 ACJA – New & Different?

2.3.1 Arrest of Persons “Without Means”

For a long time, Nigeria's criminal laws penalized poverty. Section 10 of the Criminal Procedure Act, applicable in the Southern part of Nigeria made it legal for a law enforcement agency to arrest persons “without ostensible means of sustenance,” who, in addition, cannot give “satisfactory account of themselves.” In a country in which most of the population is unemployed and therefore without ostensible means of sustenance, this is rather weird.²³ Regrettably, progressive states, such as Lagos, had such obnoxious provisions in

²³ In the second quarter of 2016, the National Bureau of Statistics estimated that 13.3% of the total population was unemployed. In real terms, that could be anywhere between 23 – 24 million people given that Nigeria's population is estimated to be about 180 million. See <<http://www.nigerianstat.gov.ng/>> accessed 8 November 2016.

their criminal laws.²⁴ Fortunately, ACJA does not continue this unfortunate tradition.

2.3.2 Reinstatement of Suspects due Process Rights

The Act specifies that unless the suspect is “in the actual course of the commission of an offence or is pursued immediately after the commission of an offence or has escaped from lawful custody,”²⁵ the arresting officer must immediately inform him/her of the reason for his/her arrest. In addition, the Act requires arresting police officer to inform the suspect of his/her right to – remain silent,²⁶ consult a lawyer,²⁷ and have free legal representation provided by the Legal Aid Council of Nigeria, where applicable.²⁸ It also requires the arresting institution to notify suspect’s relation or next of kin at no cost to the suspect.²⁹ With respect to executing a search warrant, ACJA requires an officer conducting a search to take an inventory of all items and properties taken from the suspect. The inventory should be signed by the officer and the suspect. It should be noted that failure to sign the inventory does not invalidate it.³⁰ This author imagines that it could form the basis for a challenge

24 Section 249 of the Criminal Code Law of Lagos State 2003 criminalizes “loitering” and “disorderly behavior.” Section 250 of the same law describes people involved in the acts of loitering, disorderly behavior and a range of other activities as “rogues” and “vagabonds.” It is instructive to note that other states in Southern Nigeria had similar provisions in their laws. Fortunately, the Minor Offences (Miscellaneous Provisions) Act No. 29 of 1989 abolished this category of offences but the practice unfortunately continues. See B. Owasanoye & M. Wernham (eds.) *Street Children & The Juvenile Justice System in Lagos State* (Lagos: Human Development Initiatives, 2004), 34-35 <<http://www.streetchildrenresources.org/wp-content/uploads/2013/03/street-children-juvenile-justice-lagos.pdf>> accessed 8 November 2017.

25 Section 6(1)

26 Section 6(2)(a)

27 Section 6(2)(b)

28 Section 6(2)(c)

29 Proviso to Section 6(2)

30 Section 10

with respect to the number and/or value of items recovered as exemplified by the current debate about arrest of senior judges and items recovered from searches conducted in their homes.³¹

2.3.3 Detention Time-Limits

Criminal suspects languish in pretrial detention often because they are lost in the system. Lost, because the system does not create an effective accountability loop for suspects processed by magistrates without trial jurisdiction over their alleged crimes. The scenario bears repeating. A suspect was arrested because of any one of the offences for which the death penalty could be applied.³² On the strength of a state remand legislation, s/he is taken before a magistrate court who naturally denies jurisdiction to try the suspect for that offence but assumes jurisdiction to remand. Unfortunately, the remand does not require anything of the arresting or detaining institution other than to await an advice from the directorate of public prosecutions. Given that there is thereby no incentive to produce this suspect or proceed with his/her case, the tendency is to forget about him/her. Fortunately, ACJA remedies that. Section 296(1) prescribes a 14 days maximum duration for remand in the first instance subject to an extension by another 14 days.³³ In addition, the Act creates a possibility for the magistrate to grant bail in deserving circumstances.³⁴ This is a welcome improvement on the pre-existing system where bail for certain offences – especially

31 Okakwu E. & Ogundipe S., 'Nigeria's secret police, SSS, raids judges' residences in Abuja, five states.' *Premium Times* (Abuja 8 October 2016) <<http://www.premiumtimesng.com/news/headlines/212325-nigerias-secret-police-sss-raides-judges-residences-in-abuja-five-states.html>> accessed 8 November 2017.

32 Armed robbery, kidnapping and murder are some of these offences.

33 Where, through a written application, a good cause to extend was established. Section 296(2) ACJA

34 Section 295: "The Court may, in considering an application for remand brought under Section 293 of this Act, grant bail to the suspect brought before it, taking into consideration the provisions of sections 158-188 of this Act relating to bail."

offences that attract death penalty - was reserved for the High Court.

2.3.4 Abolition of Unlawful but Prevalent Pretrial Practices

ACJA also specifically abolishes a couple of practices that have no basis in law but flourish nonetheless. These practices include arrest in lieu of a suspect.³⁵ This practice is prevalent. Arresting authorities often use it as a tactic to compel suspects to turn themselves in. Another prevalent practice is arrest on a civil wrong or breach of contract. Indeed, some individuals have turned law enforcement institutions into debt collection agencies. ACJA specifically invalidates this practice.³⁶ Yet another is the practice of arresting suspects and detaining them without providing any information about the reason for their arrest and detention. As we indicated, these practices are unlawful but yet prevalent. It remains to be seen how these specific provisions change poor practices considering that "loitering" is still considered an offence although the new law no longer recognizes it as such. Perhaps, effective monitoring of law enforcement activity is required to bring erring personnel to justice with a view to deterring others.

2.3.5 Mandatory Record Keeping

Section 15 prescribes mandatory record keeping with respect to arrests. The provision requires a record of the offence allegedly committed by the arrested person; date and circumstances of the arrest; name, occupation and residential address of the suspect; and suspects identification, including height, photograph, and finger print impression. This is important both in terms of connecting the suspect to the crime as well as in terms of preserving information for posterity. Unfortunately, the culture of record keeping is not well developed in Nigeria. Therefore, a "carrot and stick" approach

35 Section 7

36 Section 8(2) "A suspect shall not be arrested merely on a civil wrong or breach of contract."

might be required to get appreciable level of compliance. The necessary infrastructure has to be in place. Individuals who are required to collect this information have to be trained. Above all, there has to be a system of oversight to ensure that people do not fall through the cracks or suffer on account of poor implementation of this provision. Closely linked to this provision is the requirement for the establishment of a Central Criminal Registry in Abuja and Criminal Registries in every state of the federation.³⁷ The primary purpose of these registries is to document arrests and court decisions. To this extent, Chief Registrars of the relevant courts are mandated to transmit decisions of courts in all criminal trials to the Criminal Register within 30 days of the delivery of that decision. Information in the state Criminal Registers are required to be transmitted to the Central Criminal Registry as and when due. Obviously, this will address cases in which there is a doubt as to the criminal records of certain individuals. As previously recommended, the successful implementation of this provision depends on the individuals directly responsible as well as the system of checks and balances instituted to curb potential abuses.

Taken together, these provisions establish firm basis for regulating pretrial practice in Nigeria. However, they are not necessarily new provisions. The 1999 Constitution spells out fair trial safeguards but they are seldom complied with. The missing fundamental is implementation. ACJA appears to recognize that implementation will not go far unless institutions work together hence its first objective namely "efficient management of criminal justice institutions," which this author translates as not only intra-institutional but also inter-institutional.

Experience on the field shows that institutions, like non-profit organizations, often work in silos and are keener to protect their turf than contribute meaningfully to advancing the course of justice. Unfortunately, the system cannot operate optimally unless institutions cooperate and collaborate. Obviously, law reform is not enough to get institutions working together. They probably need to

37 Section 16 of ACJA

see the connections in a more hands-on way to recognize that their work is not complete until the other institutions in the criminal justice chain connect with and use them in a way that produces tangible result. There is probably difficult to achieve but achievable nonetheless. Ondo State presents an excellent example of a place where formal and informal collaboration deepened over several years of hard work translated into an effective system. Other states can learn from this. Suffice to note that it takes committed leadership at the justice ministry and in the judiciary, at the very least, to make this happen.

Assuming that our institutions are prepared to make the ACJA work, they need to find appropriate opportunities to demonstrate this. It is to this important question that we turn next.

3. Opportunities for Implementation

There are a couple of opportunities to take forward the agenda for pretrial justice reform through ACJA. For our current purposes, we will reflect on four – the recent call on states to prioritize adoption of ACJA-style criminal laws; the current campaign against corruption; the monitoring mechanism created by ACJA; and the crucial need for coordination among criminal justice institutions.

3.1 Federal Attorney General's recent admonition to Prioritize Adoption of ACJA-type State Laws

Chief Law Officers of the 36 states have an incentive to engage on ACJA. In a statement to the meeting of the Body of Attorneys General in July 2016, the Attorney General of the Federation, Mr. Abubakar Malami admonished his colleagues, Attorneys General of states to consider reforming their state criminal justice laws using ACJA as a template.³⁸ This is a commendable admonition. States that

38 See Malami A., 'Opening Address Presented by the Honourable Attorney General of the Federation and Minister of Justice at the Meeting of the Body of Attorneys General' held on 28 July, 2016, p. 5, para. 16 <<http://www.justice.gov.ng/documents/HAGF's%20Address%20at%20the>

do not already have ACJA-reflective laws should take advantage. Interested stakeholders need to take state Attorneys General to task on this. Perhaps, civil society in the states should mobilize and engage their law officers in the quest to see this aspiration fulfilled. Interestingly, new state-level criminal justice laws will probably be more beneficial to these officers than many stakeholders in the system because it could potentially facilitate speedy prosecution of crimes.

3.2 The Campaign against Corruption

The current administration anchored its campaign on two major planks – the defeat of insurgency in the North-East and the fight against corruption,³⁹ interestingly, to go far in these areas, it requires a functional, effective and efficient criminal justice system – one that has the capacity to determine the guilt or innocence of suspects in a swift manner. One of the biggest stories on the corruption front today is the allegation of corruption levelled against serving judges of superior courts by the department of state security.⁴⁰ Although there are interesting arguments on either side of the divide,⁴¹ the criminal justice system has to live up to expectation

%20body%20of%20Attorneys%20General's%20meeting.pdf > accessed 30 October 2016.

³⁹ Sotubo J., 'These are top 3 priorities of President-elect's incoming government.' *Pulse* (Abuja 8 May 2015) <<http://pulse.ng/politics/muhammadu-buhari-these-are-the-top-3-priorities-of-president-elect-s-incoming-government-id3736788.html>> accessed 30 October 2016.

⁴⁰ Okakwu E., 'Exclusive: Untold story of SSS raids on judges' homes in Abuja, five states.' *Premium Times* (Abuja 8 October 2016) <<http://www.premiumtimesng.com/news/headlines/212351-exclusive-untold-story-sss-raids-judges-homes-abuja-five-states.html>> accessed 30 October 2016.

⁴¹ See for example Okakwu E., 'Falana, Ozekhome, others disagree on arrest of Judges.' *Premium Times* (Abuja 9 October 2016) <<http://www.premiumtimesng.com/news/top-news/212416-falana-ozekhome-others-disagree-arrest-judges.html>> accessed 30 October 2016. See also C. Odinkalu, 'History Lessons on Doing the Right Thing the

by providing a platform for the guilt or innocence of these judges and their alleged accomplices to be established within reasonable time.

3.3 ACJA Monitoring Mechanism

The law creates an "administration of criminal justice monitoring committee"⁴² comprising main stakeholders in the sector⁴³ with a mandate to monitor implementation. This is a very laudable step given the possibility to track progress over time. However, this opportunity comes with huge responsibility because the work of the committee has to be data-driven to command the interest and respect of well-meaning individuals and organizations. To this end, the committee needs to develop skills and competences in data collection and management if they do not already have those. There is no way to tell a compelling story of success or failure without the use of data and that leads to the final point on opportunities – coordination.

3.4 Coordination among Criminal Justice Institutions

Coordination among criminal justice institutions has always been a problem in Nigeria. Although there was an attempt in 1991 to address this through the Administration of Justice Commission

Wrong Way.' *Premium Times* (Abuja 27 October 2016) urging for respect for rule of law in dealing with the judges cases. His piece is available at <<http://opinion.premiumtimesng.com/2016/10/27/history-lessons-on-doing-the-right-thing-the-wrong-way-by-chidi-anselm-odinkalu/>> accessed 30 October 2016.

42 Section 469

43 The Committee is led by the Chief Judge of the Federal Capital. The members are Attorney General of the Federation; a judge of the Federal High Court; the Inspector General of Police; the Comptroller-General of Prisons, the Executive Secretary, National Human Rights Commission; Chairman, Nigeria Bar Association (any of the branches in Abuja) subject to a term of two years; Director-General, Legal Aid Council; and a representative of a civil society organization working in the field of human rights and access to justice or a representative of a women's group.

Act,⁴⁴ that effort failed. Fortunately, a couple of states took advantage of the problem to create ad-hoc committees to coordinate efforts in the sector.⁴⁵ Our peculiar federal system⁴⁶ makes it imperative to create platforms for regular communication and coordination in the system. ACJA presents a unique opportunity to bring together criminal justice institutions in a sustainable manner.

3.5 NBA/MacArthur ACJA Domestication/ Implementation Project

In November 2017, the Nigerian Bar Association (NBA) will officially begin implementation of the referenced project. The project aims to engender widespread criminal justice reform by encouraging adoption and implementation of ACJA-type laws in 28 states.⁴⁷ Although the project has the funding support of MacArthur Foundation and appears to be high on the priority of the current President of the association, it is unlikely to outlive him. The tenure of the current leadership of the bar will end in August 2018 – some 9 months away. It is not clear that they have established structures

⁴⁴ No.55 of 1991 available at <<http://www.nigeria-law.org/Administration%20of%20Justice%20Commission%20Decree%20No%2055%20of%201991.htm>> accessed 9 November 2017.

⁴⁵ Ondo State is one of those states.

⁴⁶ One in which the states do not necessarily have autonomy with respect to criminal justice administration and therefore have to rely on federal institutions such as the Nigeria Police Force and the Nigeria Prisons Service, with no obligation to cooperate with the state institutions make achieving efficiency in the system a bit problematic.

⁴⁷ The project website suggests that 9 states will be targeted in the first phase – Akwa Ibom, Bauchi, Bayelsa, Benue, Borno, Delta, Kaduna, Ogun and Zamfara over a 13 month period. The second and final phases will involve 10 states each.

[http://www.nba-](http://www.nba-acj.org.ng/index.php?option=com_content&view=article&id=27&Itemid=124)

[acj.org.ng/index.php?option=com_content&view=article&id=27&Itemid=124](http://www.nba-acj.org.ng/index.php?option=com_content&view=article&id=27&Itemid=124)

that could facilitate sustainability of a project⁴⁸ that clearly requires much more than nine months to succeed.

4. Overcoming Challenges to Implementation

Laws are useless without implementation. The challenge of implementation straddles domestic and international law.⁴⁹ In Nigeria, implementation is more difficult because of the absence of political will, the faulty system of federalism practiced as well as weak institutions. In this section, we reflect on some of the challenges that the system ought to overcome to ensure implementation of the ACJA.

4.1 The Politics of Faulty Federalism

We have alluded to the faulty federal system practiced in Nigeria. Already, this is a problem in and of itself. However, the bigger problem lies with the operators of the system. The propensity to protect individual turfs often hinders criminal justice administration. This has to be addressed in the context of on-going effort to implement ACJA. Specifically, states need to work more closely together to facilitate smooth administration of justice. One way to do this is for Chief Law Officers – Attorneys General at the federal and state levels to consult one another and trigger regular

48 The core project team, for instance, has no single programme staff of the NBA Secretariat – the institutional memory of the organization – on it. This creates the impression that programmatic sustainability may not be a priority.

See

[http://www.nba-](http://www.nba-acj.org.ng/index.php?option=com_content&view=article&id=436&Itemid=126)

[acj.org.ng/index.php?option=com_content&view=article&id=436&Itemid=126](http://www.nba-acj.org.ng/index.php?option=com_content&view=article&id=436&Itemid=126) for more details

49 David Baluarte and Christian De Vos, reflect on the record of implementation of decisions delivered by judicial and quasi-judicial institutions in three major regional human rights systems – African, American and European as well as the United Nations treaty bodies. They conclude as follows: “Yet despite such successes, genuine and complete implementation is one of the most nettlesome problems that the international human rights system confronts.” See Baluarte D. & De VosC., *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (New York: Open Society Justice Initiative, 2010).

coordination engagements between criminal justice institutions in their states. One goal for the exercise might be to enhance efficiency within the system and one indicator might be how much time is won by cutting off excessive bureaucratic bottlenecks within the system. What is required to make this happen? Political will on the side of both attorneys general as well as governors.

4.2 Capacity & Infrastructure Deficits

No matter how keen the institutions and individuals are about making implementation happen, they could be hampered by poor capacity and lack of infrastructure. An example will suffice. ACJA requires interrogation of suspects to be conducted in the presence of a third party – lawyer, Legal Aid Council representative, justice of the peace or any other person of suspect's choice. In Lagos, the alternative to having any of these individuals is to electronically record the event. Regrettably, few, if any police stations have the equipment to record interrogations. With dwindling institutional budgets, this is not a priority. In addition, there is yet no mechanism in place to facilitate the participation of individuals or institutions recognized by law in these interrogation rooms. This is as much a capacity and infrastructure problem as it is a corruption problem.

4.3 Corruption

Beneficiaries of the existing inefficient system will naturally fight to keep it the way it is. Opening up the system and strengthening accountability mechanisms means that operators can be held responsible for failings within the system. For people who operate better in opaque systems, this is not palatable. Opacity encourages corruption and reduces the possibility of accountability. To ensure that implementation happens seamlessly, government must be prepared to both punish violators and ease out characters who would rather remain in the past. This is easier said than done because some of the corrupt elements are entrenched in the system. Nigeria's

current political environment however provides some hope that this could happen.

4.4 Poor Data Culture

Linked to the problem of corruption is the challenge of data. This could be related to culture, capacity and incentives. Adopting weak recording mechanisms make data collection difficult and abuse more probable. The more effective the recording and data collection mechanisms are, the less likely the abuse will escalate. Unfortunately, there is limited regard for data in many public institutions. That needs to change – through capacity building but also by creating incentives both for those who are interested to acquire the skills and for those who would rather frustrate the system, to find their way out.

4.5 Weak Oversight Infrastructure

No matter how seemingly good a system is, there has to be a system of checks and balances to preserve its integrity and prevent abuse. Although criminal justice institutions such as the police, the judiciary and the prisons have oversight structures, they are often not as efficient as they can be. Take the Nigeria Police Force for instance, the institution has internal and external oversight bodies. The internal to handle complaints for certain categories of officers and to serve as the first point of call for people looking to submit complaints. The external oversight institution – The Police Service Commission – to handle complaints that the police institution itself will not or cannot handle. Unfortunately, the internal oversight institution is weak and often partisan while the external institution led by a retired police chief, often thinks of itself as an image-laundering department of the police force. This needs to change and there are a few promising initiatives such the Complaint Response Unit established under the leadership of former Inspector General of

Police, Solomon Arase⁵⁰ in November 2015 to address pervasive impunity in the force.⁵¹

5. Conclusion

The introduction of well-written legislation like ACJA gives a lot of hope. In our context, revolutionary legislations like that are few and far-between. However, we know that a law is not worth the paper on which it is printed unless it is capable of being implemented and stakeholders take the often difficult but necessary steps to implement it.

ACJA is in a difficult position considering that our criminal justice system cannot operate without the cooperation of federal and state institutions. Therefore, we need to prioritize the adoption of ACJA-type criminal legislation by states that have not. Once we achieve 100% compliance then the system stands a better chance to run smoothly.

In the interim, stakeholders need to know what is expected of them under this new law. There has been some training of stakeholders such as the police, prisons and lawyers but it needs to go beyond the obvious. The public ought to be informed about this development because everyone is potentially a user of the criminal justice system.

Provision of infrastructure is also critical. The law expects arresting institutions to record interrogations electronically or invite certain categories of individuals to witness them. The infrastructure to make electronically recording possible must be provided to guarantee implementation. Besides, collection and management of data has gone electronic. Using manual means exposes the system to considerable compromise.

⁵⁰ Solomon Arase is the immediate past Inspector General of Police.

⁵¹ ZaggiH., 'Impunity: Police Establishes Complaint Response Unit,' *Authority Newspaper* (Abuja 8 November 2015) available at <<http://www.authorityngr.com/2015/11/Impunity--Police-establishes-Complaint-Response-Unit/>> accessed 8 November 2017.

Oversight institutions need to take their responsibilities more seriously if we are going to limit abuse of due process to the barest minimum. Internal oversight mechanisms within the Nigeria Police, justice ministries, judiciary and prisons have to be effective enough to check in on the system and punish individuals who try to frustrate it. To this end, there has to be clear lines of reporting and interface with the public so that aggrieved persons can direct their grievances to the appropriate quarters.

We also need to learn from history. Lagos State has operated a law similar to ACJA⁵² for over 10 years. It would be interesting to review the implementation of the Lagos law with a view to finding lessons that could enhance implementation elsewhere.⁵³ In this regard, it is important to urge relevant authorities to institute a culture of performance evaluation and impact assessment of this law – both holistically and at different levels in the criminal justice chain.

52 Administration of Criminal Justice Law of Lagos State, 2007. For a reflection on this law, see Ocheme P., 'The Lagos Administration of Criminal Justice Law (ACJL) 2007: Legislative Rascality or a Legal Menu for Access to Justice. *NIALS Journal of Criminal Law and Justice*(2011)Vol.1,131-149 available at <<http://www.nials-nigeria.org/journals/Peter%20Ocheme.pdf>> accessed 30 October 2016.

53 Just as this paper went to the journal for final review, the author learnt about an assessment of the Lagos Administration of Criminal Justice Law undertaken with support from the British Council in 2016. The report is not publicly available but it could be a useful resource for the debate for effective state-level implementation.

THE RIGHT TO LIFE AND THE BATTLE OVER CHILDREN'S LIFE: BABY CHARLIE GARD IN PERSPECTIVE

By

Professor Oluyemisi Bamgbose

Abstract

The Convention of the Right of the Child provides that every child has an inherent right to life. This means the child has a right to survival and development. Parents of a child have the responsibility, rights and duties to take "appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention" The Government has the responsibility to ensure that the rights of a child are respected protected and fulfilled. Article 3 of the Convention states that the best interests of the child shall be a primary consideration in all actions taken on behalf of a child. The paper considered the case of baby Charlie Gard, a baby boy, born in the United Kingdom on 4 August 2016, with a genetic defect resulting in a rare disease and the battle between the parents, the hospital where he was being treated for the rare disease and the court. The paper further examined, who amongst, the three, complied with Article 3 of the Convention in the legal battle. The paper also considered who had the right to decide whether Baby Charlie would live or die. The paper provided the position, in Nigeria, under the Childs Rights Act, if baby Charlie were a Nigerian child.

Keywords: Rights, Right to Life, Child, Baby Charlie Gard.

The Right To Life And The Battle Over Children's Life: Baby Charlie Gard In Perspective.

"To defend human life, above all when it is wounded by illness, is a duty of love that God entrusts to all."

- Pope Francis¹

The Story of Baby Charlie Gard

Hughes et al.², The Telegraph³ and many other reports gave detailed stories of a child popularly known as Charlie Gard was given. According to the reports, on August 4, 2016, Connie Yates and Chris Gard from Bedford, London, were delivered of a baby boy and they called him Charlie. At his birth, he was healthy, his weight normal and his parents looked forward to watching him grow. After a month, Charlie's parents noticed that he seemed to have some difficulty in lifting his head and supporting himself more than a normal child of his age, should. They took him to see their general practitioner who had very bad news for Connie Yates and Chris Gard.

The different reports went further to state that the news was that Charlie was very sick. The report of the medical examinations showed that Charlie had inherited some rare genes from his parents which resulted in a terrible disease that caused muscle weakness and severe brain damage. The disease was Infantile Onset Encephalopathy Mitochondrial DNA Depletion Syndrome (MDDS). Charlie had two mutated versions of the gene coding for the RRM2B protein. The Telegraph,⁴ also stated that there were experimental treatments for MDDS, but they had been tried very few times and with very little success. The experimental treatments had never been tried on someone like Charlie, a child with the RRM2B variant of the disease.

<https://twitter.com/pontifex/status/> 30th June 2017 at 7:32 pm. Accessed 10th July 2017

- 2 Hughes D., Harper P., Wheatstone R. and Christodoulou H. - Charlie's Fight. The Sun News. 26th July 2017. Available at <https://www.thesun.co.uk/news/3248426/charlie-gard/>. Accessed 30th July 2017 at 6:06pm
- 3 Telegraph Reporters (2017) 'Who is Charlie Gard, what is the disease he suffered from and what happened in the court case?' The Telegraph, 26th July 2017. Available at www.telegraph.co.uk/news/0/charlie-gard-mitochondrial-disease-suffers-legal-battle/. Accessed 30th July 2017 at 4:25pm
- 4 *Ibid.*

Hughes et al.⁵ reported that by October 11, 2017, Charlie was transferred to Great Ormond Street Hospital (GOSH) and placed on a mechanical ventilator because his breathing was shallow and he had become lethargic. By December 2016, Charlie's heart and kidneys were starting to fail. His brain function deteriorated, leading to frequent seizures. He could not move by himself, was deaf and could not open his eyes. The doctors could not even tell if he could experience pain or not. They only knew when he was having seizures by tracing it on a machine. In January 2017, the doctors at GOSH decided to try experimental treatment with nucleosides. The Telegraph,⁶ and Hughes et al.⁷ further reported that before the doctors could get ethical approval to try an experimental treatment, Charlie had another round of severe seizures. This caused the doctors to change their mind and start discussing the withdrawal of life support for Charlie. They decided they would provide palliative care but essentially, they asked Charlie's parents, to let him die.

The Legal Tussle between Charlie's Parents, the Doctors and the Courts

*"The parents want to try but it isn't up to them"*⁸

The above quote, introduced the legal tussle between Connie Yates and Chris Gard, the parents of baby Charlie and the doctors in the court of law.

Charlie's parents were not going to give up their son without a fight and they tried to take him out of the United Kingdom to the United States of America for experimental treatment.⁹ By the end of January 2017, they launched an appeal on a crowd funding website,

⁵ *Op. cit.* 2

⁶ *Op cit* 4

⁷ *Op cit* 3

⁸ Fox News, - 'Charlie Gard's parent's storm out of new court hearing.' Jul 13, 2017. Available at <http://foxnews/world/2017/07/13/charlie-gards-parents-make-final-pitch-to-bring-son-to-us-for-treatment.html> (accessed September 18, 2017 at 2:15pm)

⁹ *Ibid.*

Go Fund Me to raise £1.2million for the treatment.¹⁰ Two months later, their target was achieved and by the end of April 2017, over £1.3million had been donated for the treatment of Charlie.¹¹

On 24th February 2017, the doctors at GOSH asked the court to intervene and order that life-supporting treatment should stop as baby Charlie could not breathe by himself and had to be fed through a tube.¹² A guardian was appointed for baby Charlie by the court and the guardian was represented by an independent counsel. The case of the doctors at GOSH was that, due to the risk that Charlie might be in pain, and the very low chance that the trip to America would be of any use, his mechanical ventilator should be withdrawn in his best interest and based on his right to dignity.¹³ The arguments of the doctors in the court of law that the option of the experimental treatment might cause more suffering to Charlie did not go down well with the parents of Charlie.¹⁴ At the hearing, Connie Yates, Charlie's mother was reported to have reacted to the evidence of the doctors that Charlie might be in pain that "If he was we wouldn't be up here fighting for that" and Chris Gard was said to have "punched the table".¹⁵

On April 11, 2017, the judge ruled in the doctor's favour after a hearing in the family division of the London High Court.¹⁶ The ruling by the court was based on the fact that in Britain as in some other jurisdictions, the court is empowered to intervene when there

10 Go Fund Me Crowd funding (2017) - Fundraiser by Connie Yates. Available at <https://www.gofundme.com/please-help-to-save-charlies-life/> accessed June 27, 2017 at 12:46pm

11 *Ibid.*

12 The Guardian - 'Charlie Gard's parents say their 'beautiful boy' has died' Available at <https://www.guardian.com/uk-news/charlie-gard> Charlie Gard, News Feed. The Guardian, 2017 accessed 28 July 2017 at 3:19pm

13 *Ibid.*

14 *Op.cit.* 8

15 *Ibid.*

16 <https://www.judiciary.gov.uk/wp-content/uploads/2017/04/gard-press-summary-20170411.pdf> Judiciary of England and Wales (2017). Decision and short reasons to be released to the media in the case of Charlie Gard. (Accessed June 27, 2017 at 10:05am).

is a disagreement between a doctor(s) and parents or family members on issues relating to the treatment of children or relatives who are unable to speak for themselves. Article 3 of the Convention on the Rights of a Child 1989, states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"¹⁷

Furthermore, Article 4 provides that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention"

It suffices to say that the United Kingdom ratified the Convention on 16 December 1991 and it came into force in 1992.¹⁸ As a signatory to the Convention, the right of the child takes primacy and the court was bound to weigh the evidence before. It had to determine whether baby Charlie in his state of health was, in fact, suffering as the doctors stated and the effect or benefit of the experimental treatment on him. This was to be weighed against the submission of the parents that he was not suffering any pain and that the court should give Charlie a chance to live by undergoing the treatment in the United States of America. It is opined that the best interest of the child was the main consideration behind the ruling of the court. According to Bever and Horton¹⁹, the judge was quoted

¹⁷ United Nations Convention on the Rights of the Child (20, xi, 1989; TS44; CM 1976) United Nations, New York 1989. United Nations/human rights/CRC. Available at <http://www.unicef.org/crc/> accessed 1 September 2017 at 1:25pm

¹⁸ United Nations Convention on the Rights of the Child (UNCRC) - UNICEF UK. Available at <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> Accessed September 18, 2017 at 10:22pm

¹⁹ Bever L. and Horton A. 'Charlie Gard may have new hope: Hospital asks court to rehear case of terminally ill infant.' The Washington Post, July 7, 2017. Available at https://www.washingtonpost.com/news/worldviews/wp/2017/07/06/america-a-hospital-offers-to-admit-charlie-gard-british-baby-at-center-of-life-support-controversy/?utm_term=.5b9b209ea13b Accessed 18 September 2017 at 7:43am

as saying that "based on the unanimity among the experts that the experimental therapy Charlie's parents wanted to try could not repair structural brain damage, the life support on baby Charlie should be removed".

The court in taking the above decision was not ignorant of the fact that Charlie's parents had certain rights to take decisions on behalf of their son Charlie. Article 5 of the Convention is very clear about this fact. The Judge in the case, demonstrated his awareness of this provision when he stated in the ruling that "he will consider any new evidence".²⁰

Forster²¹ reported that Charlie's parents taking a chance of their son surviving, appealed to the Court of Appeal on May 3, 2017, asking the Court of Appeal judges to reconsider the ruling of the High Court.²² On the 23rd of May, three judges from the Court of Appeal dismissed the appeal. Connie Yates and Chris Gard further appealed to the Supreme Court.²³ On June 8, 2017, Connie, Charlie's mother, had to be led out of the Supreme Court because she couldn't help screaming at the judges when they gave their decision to the effect that the life-supporting treatment was to be withdrawn.²⁴ The parents of baby Charlie were of the opinion that the 10% chance which the treatment in the United States of America

²⁰ *Op cit.* 4

²¹ Forster K. 'Charlie Gard's parents launch fresh appeal over ruling doctors can withdraw life support from brain-damaged baby.' *The Independent*, May 2, 2017. Available at <http://www.independent.co.uk/news/health/charlie-gard-appeal-high-court-sick-baby-ill-parents-ruling-doctors-withdraw-life-support-a7712806.html>. Accessed 5th July 2017 at 12:12pm

²² British Broadcasting Network (2017) 'Charlie Gard: parents to appeal withdrawal of life support.' *BBC News*, May 2, 2017. Available at <http://www.bbc.com/news/uk-england-london-39777073> (accessed June 28, 2017).

²³ Foster A. 'Charlie Gard latest news: Updates as Charlie Gard's parent's fight to bring him home' *Express*, July 25, 2017, Available at www.express.co.uk/news/uk/832856/charlie-gard-latest-news-updates-case-high-court-baby-charlie-story/ Accessed 28 August 2017 at 4:15pm

²⁴ *Ibid.*

offered was sufficient evidence the court should consider and not withdraw the life support from Charlie. Not satisfied with the Supreme Court decision, Charlie's parents took the legal battle to the European Court of Human Rights and on June 20, 2017, and the European Court started analysing the case after lawyers representing Charlie's parents made written submissions.²⁵ However, by June 27, the European Court communicated its decision not to intervene, upholding previous court rulings in favour of withdrawing life support.²⁶ The court felt that Charlie was exposed to continued pain and that further treatment would worsen his situation. They stated that the application presented by his parents was inadmissible and the decision of the United Kingdom Supreme Court was final.²⁷

Charlie's parents believed they needed to do everything to secure the rights of their little boy and that it is their right to be able to make such decisions on his behalf. To them, it starts with the right to life. The doctors, on the other hand, believed his right to dignity should take precedence in this case, as Charlie might be in pain and suffering greatly. There was a legal tussle between the parents of Charlie, the doctors and the courts. It is therefore clear from the decision above that, although the parents of baby Charlie have parental responsibility, the court has overriding control in the best interest of the child.

The intervention of the United States of America Government and the Vatican - The International Dimension

Interest in the issue of Charlie was not restricted to the United Kingdom. All over the world, different individuals including the author of this paper, organisations, medical doctors and government watched and followed the story. According to Rawlinson,²⁸ the legal

25 *Ibid.*

26 *Op. cit.* 19

27 British Broadcasting Network 'Charlie Gard's Parents Lose European Court Appeal.' BBC News, 27th June 2017. Available at <http://www.bbc.com/news/uk-england-40423371> accessed 28 June 2017 at 10:46am

28 Rawlinson K. 'Charlie Gard: Pope and Trump biggest help in keeping him alive, says mother.' Monday 10 July 2017 Available at

battle for Charlie's life turned into "an international issue." While Collin Yate, Charlie's mother in the course of the legal battle, made reference to a 2014 case of Ashya King, whose parents won the legal battle to take him to the Czech Republic for medical treatment,²⁹ Bever and Horton³⁰ in the Washington Post, reported that a New York-Presbyterian Hospital/Columbia University Irving Medical Center, indicated interest in having baby Charlie transferred to their facility. According to the report, it was also suggested that the hospital could ship the drugs to be administered on Charlie and give instructions on the use. A Vatican owned paediatric hospital, Bambino Gesù Children's Hospital, Italy, also indicated their interest to be involved in the treatment of baby Charlie.³¹ The international dimension of the baby Charlie's case was further projected with the statement from the Pope, through a spokesman, to Charlie's parents, encouraging them not to give up.³² The Pope also encouraged Charlie's parents via a tweet where he said, *"To defend human life, above all when it is wounded by illness, is a duty of love that God entrusts to all"*.³³

In a report on July 3, 2017, the President of the United States of America, Donald Trump, offered that his government was willing to bring baby Charlie to the United States for

<https://www.theguardian.com/uk-news/2017/jul/10/charlie-gard-pope-and-trump-biggest-help-in-keeping-him-alive-says-mother> accessed 19 September 2017 at 2:57pm

29 *Ibid.*

30 *Op. cit* 19

31 *Ibid.*; Levenson E., Elwazer S. and D'Agostino L. 'Hospital offers to take in baby Charlie Gard.' Cable Network News, 5 July 2017, Available at www.cnn.com/2017/07/04/health/charlie-gard-pope-hospital/index.html. Accessed 10th July 2017 at 9:33am

32 Onyanga-Omara J. 'Parents, Trump and the pope make last-ditch attempt to save a dying British baby.' USA TODAY July 6, 2017, Available at <https://www.usatoday.com/story/news/world/2017/07/06/parents-trump-and-pope-make-last-ditch-attempt-save-dying-british-baby/454910001/> accessed 19 September 2017 at 2:18pm

33 *Op. cit* 1

treatment.³⁴ The President, through a tweet further showed support for Charlie Gard and his parents.³⁵ According to the tweet, "If we can help little #Charlie Gard, as per our friends in the U.K. and the Pope, we would be delighted to do so."³⁶ Baynes,³⁷ stated that President Trump "indicated his delight" to the government of the United Kingdom to help baby Charlie. By these interventions, Baby Charlie was offered both American and Vatican passports.

Focusing more on the intervention from the United States, the doctor who offered to treat baby Charlie, is a professor of neurology. He was the only dissenting voice in the medical field who considered that there may be a benefit to be derived from the new treatment even though he admitted then that the new treatment might not do much for baby Charlie. In his words "I would just like to offer what we can. It is unlikely to work, but the alternative is that he will pass away."³⁸ Considering the intervention, on one hand,

34 Jacobs B. and Pidd H. 'Donald Trump offers help for critically ill baby Charlie Gard.' *The Guardian*, 3 July 2017. Available at <https://www.theguardian.com/us-news/2017/jul/03/donald-trump-offers-help-for-terminally-ill-baby-charlie-gard>. Accessed 10th July 2017 at 4:54pm.

35 Dougall S. "We'll help save Charlie Gard" – Donald Trump wades in row over sick baby.' *The Daily Star*, 3rd July 2017 Available at www.dailystar.co.uk/news/latest-news/626985/charlie-gard-donald-trump-twitter-britain-great-ormond-street-hospital/ Accessed 11 July 2017 at 8:09pm

36 Donald Trump via Twitter. Available at <https://twitter.com/realDonaldTrump/status/> 3 July 2017 at 7:00 am. Accessed 10th July 2017; Foley Elise (2017) 'Donald Trump Tweets U.S. 'Would Be Delighted' To Help Terminally Ill U.K. Infant', 3 July 2017 the Huffington Post. Available at www.huffingtonpost.com/entry/donald-trump-charlie-gard_us. Accessed 10th July, 2017 at 5:13pm.

37 Baynes C. 'Charlie Gard: Donald Trump 'to confront Theresa May over terminally ill baby boy' July 6, 2017, Available at <http://www.independent.co.uk/news/uk/politics/charlie-gard-donald-trump-theresa-may-g20-summit-terminally-ill-baby-boy-us-uk-court-ruling-pope-a7826291.html>. Accessed 28 August 2017 at

38 Dyer C. Law, Ethics, and Emotion: the Charlie Gard Case. Available at *BMJ* 2017; 358:j3152 doi: 10.1136/bmj.j3152 (Published 2017 July 04). Accessed July 30th, 2017 at 11:12am.

Dr. Michio Hirano, the American doctor, did not examine Charlie before offering help and according to Bosely,³⁹ some ethicists argued that this is wrong. It has been argued whether it is right for the American doctor to make an opinion without seeing the patient face to face and insist on it, when every other doctor saw the patient and examined his medical history said there was no hope for him. On the other hand, for Charlie Gard, it can be said that the doctors in the United States and even the Vatican who offered to treat him have offered some hope. Like his parents, the Americans believe that Charlie has a right to life and this should be exhausted before he is deprived of life-supporting treatment. To the parents of Charlie, the intervention of President Trump gave them hope.⁴⁰ However, the Daily Mail⁴¹ reported that certain experts were of the opinion that the "interference" by President Trump and the Vatican were "cruel" and offered "false hope." The issue of baby Charlie, while it transcended governments, also sparked several debates.

The Rights of Baby Charlie

A right is that to which one has a valid claim. It is the liberty to enjoy a certain privilege, act in a certain manner or refrain from acting in a certain manner.⁴² Human rights may, therefore, be defined as those rights to which every human being may justly claim. They are rights which may be enjoyed by anyone and are not

39 Bosely S. 'US Doctor's Intervention in Charlie Gard Case Raises Ethical Questions'. The Guardian, 25 July 2017. Available in the Guardian News <https://www.theguardian.com/uk-news/2017/jul/25/>. Accessed 30th July 2017 at 11:23am.

40 *Op. cit* 19

41 <http://www.dailymail.co.uk/video/news/video-1495855/Very-cruel-Expert-blasts-Vatican-Trump-Charlie-Gard.html> (2017) 'Very cruel: Expert blasts Vatican and Trump over Charlie Gard' (accessed September 18, 2017 at 2:05pm).

42 Ogbu O. N. (2013) *Human Rights Law and Practice in Nigeria*, 2nd Revised Edition. (Enugu, Snapp Press Ltd, 2013)

to be dependent on the will of another human being.⁴³ The right to life, is the most basic and fundamental of all human rights as all other rights depend on the existence and enjoyment of this right by an individual.⁴⁴ Article 3 of the Universal Declaration of Human Rights, states that, everyone has the right to life, liberty and security of persons.⁴⁵ Article 4 of the African Charter, also guarantees, the right to life in stating that, "human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

The Constitution of the Federal Republic of Nigeria,⁴⁶ in section 33(1), guarantees the right to life in the following terms, "every person has the right to life and no one shall be deprived intentionally of his life, save in execution of a sentence of court in respect of a criminal offence of which he has been found guilty." Since it has been established that everyone has a right to life, it goes without saying that this right to life extends to children. It is unanimously agreed that this right, which is applicable to children includes a day-old baby. However, it is still controversial whether unborn children should also enjoy a right to life but the right of a non-autonomous child to life no matter how young is unquestionable.

Some of the laws that define the right of the child to life, include the following:

- **The Children Act (England and Wales—1989 and 2004).** This Act generally makes provision for the care of a child and the duties of parents and guardians. There are no specific instructions for end of life decision making but like all child laws, it emphasises the following principles as important;

⁴³ United Nations Department of Public Information (1998) The Universal Declaration of Human Rights: A Magna Carta for all Humanity.

⁴⁴ *Op. cit.* 42

⁴⁵ *Op. cit.* 43

⁴⁶ Constitution of the Federal Republic of Nigeria, 1999 (As Amended)

- a. All decisions to be made about a child should be in his best interest.
 - b. Where the child is of age, efforts should be made to accommodate a child's feelings and wishes and regard made to any harm which may have been suffered by that child.
 - c. Parental rights and duties must be exercised in the child's best interests.
- **The United Nations Convention on the Rights of the Child.** The United Nations Convention on the Rights of the Child (UNCRC) applies to every child and young person under the age of 18 and was ratified by the UK in 1991. Although, it cannot be used by UK courts directly, the UK government is by the ratification, bound to honour it and make all the child laws compatible with it.
- **The Human Rights Act (HRA) 1998⁴⁷** incorporates and gives effect in the UK to the rights and freedoms guaranteed under the European Convention on Human Rights (ECHR). Articles of the Convention that deal with the withdrawal of life-supporting treatment, especially with regard to children are:
- a. Article 2: the right to life and the positive duty to protect it
 - b. Article 3: the prohibition of inhuman and degrading treatment
 - c. Article 5: the right to liberty and security of the person
 - d. Article 8: the right to respect for private and family life
 - e. Article 9: the right to freedom of thought, conscience and religion
 - f. Article 14: the prohibition of discrimination in respect of enjoyment of the other rights

As observed by Larcher et al.,⁴⁸ "Although there is a positive obligation to protect life, in certain cases, treatment can be withheld

47 UK Human Rights Act (UKHRA) 1998.

48 Larcher V, Craig F, Bhogal K, et al'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for

or withdrawn, where it is in a child's best interests to do so, even if this will result in the child's death. When tasked with intervening in disputes which have arisen over the withholding or withdrawing of treatment, judges seek to balance the duty to respect and protect life (Article 8) against the duty not to inflict inhuman and degrading treatment (Article 3), whilst attempting to respect the provisions of Articles 8 and 9."

Can the right to life be the most important life of Charlie or the right to dignity? His parents insisted on the right to life and for this reason, they fought in court to the highest level. His doctors, on the other hand, feel that his right to dignity should be protected and be treated as more important. Both sides were engaged in court in this debate. It is opined that no right is more important than the other as they are intertwined.

Patient Autonomy versus Beneficence

A major dilemma in the medical world is the fight between autonomy and beneficence. Beneficence means to do good. It is that branch of medical ethics that obliges the doctor to seek the good of others. It involves preventing the infliction of harm by others and promoting good. This also very well, describes the relationship and responsibility of a parent to a child. Therefore, basically, the doctor has the same intentions as the parents. However, doctors are also bound by the Hippocratic Oath. According to Hippocrates, the purpose of medicine is, "To do away with the sufferings of the sick, to lessen the violence of disease and to refuse to treat those who are overmastered by their disease."⁴⁹ To most doctors, this would include withdrawing life-supporting treatment from patients when there is no other possible treatment for them. According to

practice.' Archives of Disease in Childhood 2015;100:s1-s23. <http://adc.bmj.com/> on July 21, 2017 - Published by group.bmj.com

49 Street K. et al. 'The decision-making process regarding the withdrawal or withholding of potential life-saving treatments in a children's hospital.' Journal of Medical Ethics 2000;26:346-352. Published by group.bmj.com

Wilkinson and Savulescu,⁵⁰ it is ethical for doctors to decline to provide treatment that is judged to be medically inappropriate or futile, either when such treatment is contrary to the interests of the patient, or when there are insufficient resources to provide treatment.

In making end-of-life decisions, a patient usually has the utmost say. This is because doctors would usually respect the wishes of an autonomous patient. Where a patient for whatever reason is unable to make such important decisions for himself, it falls to a surrogate who is usually a close relative and is expected to know what would be in the best interest of the patient. Whatever the case may be, a patient is entitled to make certain decisions concerning his treatment. Where the patient is a child who is not old enough to make decisions for himself, the parents or other caretakers such as a guardian would usually make the important decisions. The doctors would always have the opportunity to offer advice on what they consider to be in the best interest of the child.

In determining the best interest of a child who is on life-supporting treatment, there are many factors to be considered such as the child's comfort, the extension of life and even the possibility of a cure. While a patient has the right to make decisions concerning his or her treatment, the doctor is obliged to do what he/she thinks is in the best interest of the patient. Sometimes, there is a clash between the decision of the patient and the opinion of the doctors. Where the patient is an adult, this might not pose much of a problem as both parties may come to a consensus and at the very worst, the doctor would respect the wishes of the patient.

However, where the patient is a baby or a child who is non-autonomous, the issue of decision-making get a bit more complex as the clash is now between parents and doctors. This is usually the case when the treatment the parents insists on would keep the child alive but leave the child with a poor quality of life like complete paralysis or a completely vegetative state where the child is

50 Wilkinson D. and Savulescu J. (2011) 'knowing when to stop: futility in the ICU.' *Current Opinion in Anaesthesiology* 2011, 24:160-165

basically brain dead as in *Re J*.⁵¹ This, unfortunately, happens quite often. The case of Charlie Gard is one of the numerous examples of this clash. On the other hand, as in *Re B*⁵², there are some cases where the parents are the ones who want to pull the plug and the doctors or health commissioners are insisting that there are other forms of treatment which may be beneficial to the child.

Wilkinson and Savelescu,⁵³ believe there are two reasons why a doctor would refuse treatment or life-sustaining treatment or judge a treatment to be medically inappropriate. According to them, the first is that the doctor believes that, further treatment is contrary to the patient's interests and would harm the patient. They further stated that it is a type of paternalistic judgment about the value of treatment and life. Wilkinson and Savulescu,⁵⁴ went on to say that either the quantity of life (duration of survival) is so short or improbable, or the quality of their life so reduced, that the pain, suffering, distress and indignities of treatment outweigh the benefits. It is believed that this is the opinion of the doctors at Great Ormond Street Hospital who so far, have been Charlie's treating physicians.

The second reason according to Wilkinson and Savelescu, why a doctor would refuse treatment or life-sustaining treatment or judge a treatment to be medically inappropriate, and which is a more controversial reason or justification, is that, providing treatment would be harmful to other patients. This justification has nothing to do with Charlie Gard's case.

Savulescu⁵⁵ in a paper titled, "Is it in Charlie Gard's Best Interest to Die", referred to an earlier paper⁵⁶ where he said, "Having spent 20 years in medical ethics, I do believe some lives are intolerable and not worth living, but this is extremely rare."

51 *Re J (a minor) (wardship: medical treatment)* (1991) Fam 33

52 *Re B (a minor) (wardship: medical treatment)* (1981) 1 WLR 1424

53 *Op. cit.* 50

54 *Ibid.*

55 Savulescu J. 'Is it in Charlie's best interest to die?' Available at: www.thelancet.com. May 5, 2017, [http://dx.doi.org/10.1016/S0140-6736\(17\)31204-7](http://dx.doi.org/10.1016/S0140-6736(17)31204-7)

56 Savulescu J. (2006) End-of-life decisions. *Medicine* 2006; 33: 11-15.

Savulescu,⁵⁷ further stated thus, "The best example is severe dystrophic epidermolysisbullosa. In this condition, the skin relentlessly peels off, causing extreme pain and infection. In the most severe form, the child often dies of infection in the first year of life, even with medical therapy. Severe pain is an intrinsic part of the syndrome; this situation is not the case in Charlie Gard." He went on to explain the concept of distributive justice with regards to Charlie's case. In some cases, treatment may be withheld on the grounds that not only would it be futile but it would deprive another person to whom it would be more beneficial. However, this is not the case with Charlie Gard as his parents have been able to raise money through a GoFundMe project to pay for his treatment. As such, the right thing to do would be to allow his parents to take him to the USA for treatment.

Wilkinson and Truog et al,⁵⁸ opined that parents should be allowed to make such decisions if there is any hope and cost, poses no problem. They stated thus, "When it comes to experimental treatment, there can be different reasonable views among health professionals about how to weigh up the chance of benefit against the burdens of the treatment. They went further to state that in the face of such disagreement, the decision properly belongs to the parents." Wilkinson⁵⁹ in a later write-up suggested that "Assuming the treatment is affordable, and the parents want it, it should be provided. However, when no health professionals think that the experimental treatment is worth pursuing, parents' request for treatment should not be granted" In the case of Charlie Gard, the doctor in the United States of America, though they were in the minority, believed that there was some hope for Charlie. It is

57 *Op. cit.* 55

58 Wilkinson D, Truog R, Savulescu J. 'In favour of medical dissensus: why we should agree to disagree about end-of-life decisions.' *Bioethics* 2016; 30: 109-18.

59 Wilkinson D. 'Beyond resources: denying parental requests for futile treatment.' Available at www.thelancet.com. Published online May 4, 2017, [http://dx.doi.org/10.1016/S0140-6736\(17\)31205-9](http://dx.doi.org/10.1016/S0140-6736(17)31205-9). Accessed 19 July 2017 at 1:34pm

opined that though the chances of the experimental treatment being successful were very slim, it was still worth trying.

End of Life Decision Making: Parents versus Doctors

It may be argued that the parents of a sick child have a right to take the child elsewhere for treatment and must be allowed to do so, unless it puts the child at significant risk of harm. According to Carnevale et al.,⁶⁰ in England, patient autonomy is not given as much importance as beneficence, while in countries like America and Canada, patient autonomy and by extension, parental autonomy is more respected. As a result, court battles like the case of Charlie Gard, are more likely to occur in England which may remain more paternalistic in treatment decisions for children.

Because non-autonomous children lack the ability to make decisions for themselves, they rely on their parents or caregivers to make such decisions for them. It is agreed that in any situation, the best interest of the child should be of the utmost importance. The dilemma arises, when it is time to determine who should decide what is actually in the best interest of the child. Should it be the parents or should it be the doctors? In cases where there is a conflict between the doctors and the parents of the non-autonomous child, should the court be allowed to intervene? Laws in some countries like England and Nigeria, agree that the child becomes the ward of the court in such situations and the court is allowed to appoint a guardian ad litem, who would be able to determine what is in the best interest of the child from an objective point of view.⁶¹

It may be argued that the parent of a child is in the best position to know what is best for their child. On the flip side, it may also be argued that a parent of a sick child cannot be trusted to make logical decisions to prevent the child from suffering. If the child is so sick that they have to be placed on life support in the first place, such

⁶⁰ Carnevale F. A., Canoui P., Cremer R. et al. 'Parental involvement in treatment decisions regarding their critically ill child: a comparative study of France and Quebec'. 2007, *Paediatric critical care med*; 8:337-42.

⁶¹ Children Act of England and Wales, 1989, 2004; Child's Right Act of Nigeria 1991

parents have grief and even a bit of selfishness to deal with at a time when the child's best interest should be of the utmost importance. Carnevale,⁶² opined that based on experience, superior medical knowledge and objectivity, doctors would be in a better position to make decisions about pulling the plug on a non-autonomous child.

Schneider and Rice,⁶³ discussed a case similar to Charlie's case. Joseph Marachli, a Canadian baby was diagnosed with a rare progressive and incurable neurological disorder known as Leigh's disease. His parents wanted a tracheotomy performed. They admitted that while their son's disease was terminal, the procedure would extend his life by some months enabling him to die at home where his parents could care for him. The Canadian doctors refused. In their opinion, the treatment would be futile. It was also reported that his parents then fought to have him transferred to the United States and with the support of pro-life groups such the Catholic group, Priests for Life which funded the entire surgery, they succeeded. According to Hutchison's report with the ABC News Medical Unit,⁶⁴ Joseph Marachli's life was extended by several months and he was able to die at home. While the Canadian doctors were right about the terminal nature of Joseph's disease, his parents made the better choice. After the surgery, he was able to respond to both parents and make some movements. Considering the fact that the parents of a child are the ones who would live with the consequences of whatever decision is made, this writer poses a question whether it would not be more appropriate to let parents

62 Carnevale F. A. 'The birth of tragedy in paediatrics: A phronetic conception of bioethics'. 2007 *Nurseethics* 14:571-82 (PubMed)

63 Schneider M. and Rice S. (2017) 'Baby Joseph, focus of treatment dispute, dies in his sleep.' Cable Network News, 28 September 2011. Available at www.cnn.com/2011/09/28/health/baby-joseph/index.html. Accessed 28th July 2017 at 10:41am.

64 Courtney H. and ABC News Medical Unit (2011) 'Baby Joseph dies at home after long treatment battle.' ABC News, 28 September 2011. Available at <http://abcnews.go.com/Health/Wellness/baby-joseph-dies-home-long-treatment-battle/story?Id=14623722> Accessed July 15, 2017 at 11:02am

make decisions, they believe, they can live with? However, on the other hand, it is relatively safe to also argue that when parents are allowed to make such decisions, what they consider to be in the best interest of the child, are most times, inseparable from their own interest or the interest of the family at large.

The above case of Joseph Marachli goes to show that parents would always want to be involved in end of life decisions concerning their children and cannot be expected to readily agree with doctors who say that death is the best option. They would do anything and might make rash decisions in the process. Another case relevant to this discourse is that of Ashya King whose story was followed closely by *The Guardian*.⁶⁵ Ashya's parents were not ready to wait for the court or even doctors to decide on the mode of treatment for their son. Against, the advice of the doctor's handling their son, they desired proton therapy over conventional chemotherapy for their son who had just had a brain tumour removed. Khomamai and Doward,⁶⁶ reported that on August 28th, 2014, the parents took Ashya and absconded by ferry to France. However, they were found and arrested in Spain while their son was rushed to the hospital for urgent treatment. However, as reported by Bosely,⁶⁷ the High Court in Britain on September 5th, 2014 ruled that Ashya could receive proton treatment in Prague. Ashya received his treatment on September 9th, survived and by March the next year, Davies⁶⁸ reported that according to his father, new scans

65 The Guardian. 'Parents of Ashya King put him at risk, report says' <https://www.theguardian.com/uk-news/2015/sep/24/parents-ashya-king-put-him-risk-report-says> Accessed 3 November 2017 at 11 30 pm

66 Khomami N. and Doward J. 'Parents arrested as missing Ashya King found by police in Spain'. *The Guardian*, 31 August 2014. Available at <https://www.theguardian.com/society/2014/aug/31/ashya-king-found-spain-parents-arrested>. Accessed 30th July 2017 at 6:22pm

67 Bosely S. 'Ashya King given legal go-ahead for cancer treatment in Prague'. *The Guardian* 5 September 2014. Available at <https://www.theguardian.com/uk-news/2014/sep/05/ashya-king-prague-proton-beam-therapy-court-ruling>. Accessed 30th July 2017 at 6:30pm

68 Davies C. 'Ashya King's parents say he is cancer-free after proton therapy.' *The Guardian* 23 March 2015. Available at

had shown that Ashya was cancer-free. After his case, the NHS decided to start paying for children with medulloblastoma to travel abroad and receive proton therapy.

The Place of the Court in Making End-Of-Life Decisions

In situations where children are unable to make decisions, it is accepted that parents have the responsibility to make decisions on their behalf. It is assumed that parents with the love and commitment towards their child's welfare, while sharing religious, cultural and family beliefs with the child, are in the best position to make sound decisions on behalf of their child. It is not in doubt that parents in certain cases may be too emotionally involved to make objective decisions that are in their child's best interests. The concept of parental responsibility which enables an individual to make decisions on behalf of his or her child, in the child's best interests is recognised. This is the position in Nigeria under the Child's Right Act, 1991. Further discussion on the Nigerian position is in the latter part of this paper. In certain circumstances, the court can take on parental responsibility or it can be sought by external persons, such as social workers and healthcare providers.

In some jurisdictions like England, where there is a disagreement between the parents or caretakers of the non-autonomous child and doctors, the court gets to be the decision maker. It does this by appointing a guardian for the child, who is supposed to make decisions in the best interest of the child, regardless of the parents' feelings or the doctor's opinions. The child's guardian is expected to be objective and unbiased. However, in most cases, the court has ruled in favour of the doctors. There are however rare exceptions where the court rules in favour of the parents against medical professionals. In *Child MB*,⁶⁹ the court ruled

<https://www.theguardian.com/uk-news/2015/mar/23/ashya-king-now-free-of-cancer-after-proton-therapy-say-parents>. Accessed 30th July 2017 at 6:35pm

against fourteen (14) doctors to sustain life-supporting treatment for a child.

This paper poses that question - whether the court has the right to give a ruling to remove a life-supporting machine on a child, when all the treatments available have not been thoroughly explored and exhausted. At this juncture, it is important to know the place of the court. The court falls into the judicial arm of government. The involvement of the court in taking a decision where there are conflicting positions between the doctors and relatives takes this discussion in the paper to the question raised by Taylor⁷⁰ as to "who is ultimately responsible for the health and well-being of our children" and "who decides on what is best for them" Taylor cited in his article several cases and advocated for parents freedom of choice in the healthcare of the child. It is opined that the overriding stand on this issue should be the best interest of the child. The effect is that nobody should make any decision to take away the life of a child neither should a child be made to continue to be on a life support except it is in the best interest of the child.

Charlie to Die or Not To Die

On July 10th 2017, Charlie's parents having, gone to the European Court of Human Rights at heard from a doctor in the United States of America, gotten messages from the Pope and having the American President involved and offering support went back to the High Court and asked the judge to review the case.⁷¹ The judge gave them less than 48 hours to provide new evidence that the experimental treatment would work.⁷² Judge Francis, the judge who first heard Charlie's case referred to the U.K Court of Appeal's decision in the case of *Wyatt v Portsmouth NHS Trust*⁷³ and said "In our judgment, the intellectual milestones for the judge in a case such

70 Taylor Paul Anthony 'Who knows what's Best for your Children? You? Or the Government' 13 April 2017 Available in www4.dr-rath-foundation.org Accessed on 19 September 2017 at 5:29pm

71 *Op cit.* 28; *op.cit.* 31

72 *Op. cit* 28

73 *Wyatt v Portsmouth NHS Trust.* 2005. EWHC 117

as the present are, therefore, simple, although the ultimate decision will frequently be extremely difficult. The judge must decide what is in the child's best interests. In making that decision, the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the child. There is a strong presumption in favour of a course of action which will prolong life, but that presumption is not irrebutable. The term 'best interests' encompasses medical, emotional, and all other welfare issues.⁷⁴ In situations like this, the court has two issues to consider. First, will new treatment help the child in any way or will it only cause more pain? Where treatment might be burdensome, financially or otherwise, the other issue to consider is if the burden outweighs the benefit. For Charlie, his doctors are of the opinion that he is in pain, pain that won't go away even with nucleoside treatment and "when, as in his case, the consensus of all the doctors who have examined him is that the treatment would be futile, there are no benefits to put on the scale."⁷⁵

On July 24th, 2017, Greene and Clarke,⁷⁶ reported that Charlie's parents decided to stop fighting after new scans showed that the damage that had been done to his brain and muscles were unalterable. Robinson and Greenhill,⁷⁷ stated that these new scans showed no benefit to weigh against the risk of flying baby Charlie to the United States for treatment. Yate and Connie made a decision to take Charlie home so that he could die there but his ventilator

74 *Op cit.* 16

75 *Op. cit.* 38

76 Greene R. and Clarke H. 'Charlie Gard's parents give up battle to take son to US.' Cable Network News, 24 July 2017. Available at www.edition.cnn.com/2017/07/24/health/charlie-gard-decision/index.html

77 Robinson M. and Greenhill S. (2017) 'High Court judge to rule TODAY on whether to allow Charlie Gard's parents to take him home to die as doctors say his ventilator 'cannot fit through the family's front door'' Daily Mail, 25 July 2017. Available at <http://www.dailymail.co.uk/news/article-4728210/Charlie-Gard-s-parents-endure-High-Court-case.html> Accessed 28th July 2017 at 7:30am

could not fit into their house. Mendick⁷⁸ said that the parents decided to spend Charlie's last hours with him at a hospice where he was being given palliative care which relieved him of whatever pain might be feeling. Baby Charlie died on the 28th of July, 2017, a day after the court ordered him to be moved to the hospice and life support to be withdrawn.⁷⁹

The fight put up by Charlie's parents is considered, not out of place. Yate and Connie were in constant contact with an American couple whose baby survived due to the experimental treatment offered by the American doctor. They might have encouraged them and given them a reason to fight on. Smith-Squire and Robert,⁸⁰ reported on Arthur and Olga Estopinan's baby, Arturito, who was the first to receive the new experimental treatment in the United States. They, however, pointed out that while the Estopinan baby has MDDS, he suffered from a different variant. Arturito survived and said to be alive. Smith-Squire and Roberts,⁸¹ are of the opinion, that if Arthur and Olga Estopinan had not tried, Arturito would have been dead.

Another compelling case in favour of trying all available treatments is the case of Haleigh Poutre,⁸² another child whom

⁷⁸ Mendick R. 'Great Ormond Street wants Charlie Gard moved to hospice to die by Friday, court hears'. The Telegraph, 26 July 2017. Available at <http://www.telegraph.co.uk/news/2017/07/26/charlie-gard-judge-decide-babys-life-will-end-parents-legal/>, Accessed 29th July 2017 at 3:44pm

⁷⁹ Bever L. 'Our beautiful boy has gone' Parents of Charlie Gard say he has died. The Washington Post, 28th July 2017. Available at www.washingtonpost.com/news/worldnews/wp/2017/07/28/parents-of-charlie-say-he-has-died-reports. Accessed 29th July 2017 at 4:02pm

⁸⁰ Smith-Squire A. and Roberts S. 'If we were British, our son would be dead.' The Sun News 13th April 2017. Available at <https://www.thesun.co.uk/living/3318065/arthur-olga-estopinan-arturito-charlie-gard-court-case/>, Accessed 10th July 2017 at 8:00am

⁸¹ *Ibid.*

⁸² Wen P. 'Timeline - the case of Haleigh Poutre'. The Boston Globe, 3 August 2014. Available at <https://www.bostonglobe.com/2014/08/02/timeline-the-case-haleigh-poutre/9j3BhnlrA8AxJYo4PZW0N/story.html> Accessed July 15, 2017 at 9:27am.

doctors concluded would die due to health-related issues. According to Wen's timeline,⁸³ the child was born in 1994 a healthy child. By the time she was four, she was adopted and lived with an aunt. At age 11 in 2005, she was rushed to the hospital, diagnosed to have suffered severe brain injury from frequent abuse and the doctors involved in her treatment claimed she was virtually brain dead and if left on life support, would be in a persistent vegetative state. On October 5th, 2005, a judge approved a request from the Commissioner of the Massachusetts Social Department, to withdraw life-supporting treatment. Her guardian appealed but the appeal was dismissed. On January 17, 2006, the Court of Appeal, ruled in favour of the doctors that life support should be withdrawn. The very next day, she woke up from a coma shortly before her scheduled removal from life support breathing on her own and responding to commands.⁸⁴

Were Baby Charlie a Nigerian Child: The Position of the Law

Section 1 of the Nigerian Child's Right Act, 2003, states that the best interests of the child shall be of the utmost importance. The best interest of the child would be considered to be that which is for the child's good and would keep the child away from undue suffering and harm. It does not refer to physicians but it does state that all individuals and institutions, which would include hospitals and medical personnel, must act in the best interest of the child.

The Act recognizes that there would be situations when decisions would have to be made on behalf of a child. To this effect, sections 82-91 provide for the guardianship of a child including occasions when a guardian may be appointed. Section 83 gives the guardian of a child parental responsibility unless he is

83 Wen P, 'Missed warning signs nearly killed Haleigh Poutre' *The BostonGlobe*, August 3, 2014. Available at <https://www.bostonglobe.com/metro/2014/08/02/missed-warning-signs-nearly-killed-haleigh-poutre/fqTaEv2QlbSUxChKAfhbXJ/story.html>. Accessed July 15, 2017 at 9:44am.

84 *Op. cit* 80

appointed a guardian ad litem. Appointment of a guardian may be done whether the parents of a child are present or not if the court feels that the parents may not be able to make the right decisions for a child.

Section 59 of the Act empowers the court to order a care or supervision order in proceedings in which a question arises as to the welfare of a child. In the case of life-supporting treatment, the court would obviously rely on doctors and other healthcare providers to provide support for or against sustaining life-supporting treatment. The Child's Right Act does empower the court to settle disputes affecting the welfare of a child which may arise between parents or between other joint guardians in section 88.

The Act in Section 4 gives the child a right to survival and development, provisions which are related to section 13(1) which states that a child is entitled to the best attainable state of physical, mental and spiritual health. The Act, therefore, implies that it is the right of a child to be treated when ill, especially when it can be afforded and it would not cause undue harm or disadvantage to another. From this it can be inferred, that while doctors may have more experience and superior medical knowledge than the parents of a child, it is the right of a child that all options in his/her best interest be explored first before a decision is made to let him/her die.

If baby Charlie were a Nigerian child, his parents would be his guardians by section 82 and would have primary responsibility for him. They would be the ones making all the decisions based on the advice of his doctors. If baby Charlie was a Nigerian child, his case might still get to the court, and by the Child's Right Act, it is safe to believe that the court when taking a decision, the best interests of the child shall be of the utmost importance.

Recommendation

It is posited and recommended that should be a standard for surrogate decision-making that has to do with life-supporting treatment and end of life decisions. This will provide some sort of

guidance for decision makers, be they doctors, parents or the court as the case may be.

It is recommended that before a claim is made, that a child has a right to die with dignity and be protected from inhumane treatment, the right to life should be placed first.

It is also recommended that in considering the right to life and any other right, that a child is entitled to, the best interest of the child should take primacy.

Conclusion

The law seems to stick firmly with making decisions which are in the best interest of the child. For a child on life-supporting treatment, what is in the child's best interest would be seen to have been done when all options have been explored, all treatments and therapies tested. This will be so, especially, when it is not going to expose the child to significant harm or cause significant harm to another before a decision is made to pull the child off life-supporting treatment.

When everything has been done and there is no way forward, then the right to die with dignity can come in. It is easy to agree that life-supporting treatment may be withdrawn when there is no way forward. It is opined that Charlie's parents were easier to convince, to allow the removal of the life-supporting machine, when they saw that they had done everything humanly possible, to save their son Charlie and that the new treatment would be of no use.

Every person, including a child, has a right to life. It is trite to note that all other rights including the right to dignity are based on the right to life. In the battle over children's life, decision makers should keep this in mind.

THE NATIONAL HUMAN RIGHTS COMMISSION OF
NIGERIA (NHRCN) AND ITS RELEVANCE FOR
ACHIEVING THE SUSTAINABLE DEVELOPMENT GOALS
(SDGS) BY 2030 IN NIGERIA

By

Gwar, E. Terngu

Abstract

Making human rights integral to development and a post-2015 development framework would contribute to more just and inclusive development outcomes, especially through an emphasis on participation, empowerment, and transparency. It would help prevent development programmes from harming and disadvantaging vulnerable populations, by requiring analysis of the human rights impacts of such programmes, and mitigation or avoidance of adverse impacts as well as consultation and participation of those affected by these programs themselves. The rooting of development in human rights would encourage a focus on the poorest and most marginalized communities, including women, children, ethnic and religious minorities, indigenous peoples, and people with disabilities—groups that may be invisible in some development approaches. The paper is a critical analysis of what role the national human rights institutions like the NHRCN can play in building support for a broader conception of development, defined as "freedom from fear and want for all without discrimination" and the creation of conditions in which people everywhere can realize their universal human rights—civil, political, economic, social and cultural. This paper argues that the NHRCN is a catalytic institution in Nigeria's quest to achieve the Sustainable Development Goals (SDGs) by 2030.

Introduction

The concept of development defies a single universally accepted definition. The field has been characterised by changes in the conceptions about the process of development itself. These changes are as a result of the need to find a common ground between the concept of development and how it is practiced in the field. Consequently, there are a myriad of views about its definitions and the strategies pursued to achieve development. These myriad views gained ground in the 1950s with literatures in development theory and practice blossoming since the mid 1980s. The challenge for the development community in all this is to identify practical and pragmatic options. The best route is to unleash people's entrepreneurial spirit-to take risks, to compete, to innovate, to determine the direction and pace of development.

Development as a concept has varying definitions depending on one's ideological standpoint or professional inclination. Todaro¹ considers development as multidimensional process involving the reorganization and reorientation of entire economic and social system. This involves, in addition, to improvement of outcome and output, radical changes in the institutional, social and administrative structures as well as in popular attitudes, customs and beliefs.² The main contention is that development is both a physical and social process. According to Seers³ the purpose of development is to reduce poverty, inequality and unemployment. Seers⁴ argued that: The questions to ask about a country's development are therefore: what has been happening to poverty? What has been happening to employment? What has been happening to inequality? If all three of these have declined from high levels, then beyond doubt, this has been a period of development for the country concerned. If one of

1 Todaro, M.P. (1985). *Economics for Developing Countries*. Long Man, London.; pg.108.

2 *Ibid* at 1

3 Seers, D (1963). 'The Limitations of the Special Case'. *Bulletin of the Oxford Institute of Economics and Statistics*.

4 *Ibid* at 3

two of these central problems have been growing worse, especially if all three have, it will be strange to call the result 'development' even if per capita income doubled.

This definition by Seers is important for an understanding of development as centred on improvement in the living condition of the individual. By implication, it means, the economy could grow without the country being developed. This is correctly observed by Torado⁵ who says:

There were, for example a number of developing countries which experienced relatively high rates of growth of per capita income during the 1960s and 1970s, but which simultaneously showed little or no improvement or witnessed an actual decline in employment, equality and real incomes of the 40 per cent of their populations. By the earlier growth definition, these countries were developing. By more recent Poverty Equality and Employment criteria, they were not.

In their definition, Mclean and Mcmillan⁶ posit that development is a normative concept referring to a multidimensional process. In their view, increased economic efficiency, expansion of national economic capacity and technological advancement are generally accepted as necessary conditions, if development is to be sustained. Thus development concept maintained a linear shape based on trust in science, reason technology, and the free market. This kind of development succeeded in establishing a more systemic and rigorous approach to development initiatives. However, this approach to development, with its related bag of practical tools, did not deliver the expected results. The rising levels of poverty level, with over a billion men, women and children being subjected to, is

⁵ *Ibid* at 1

⁶ Mclean, I & Mcmillan, A. (2003). *Concise Dictionary of Politics*. Second Edition, Oxford, NY & Katz, p.g 148

an indication of the failure of this kind of development rooted in economic growth, science and technology.⁷

The search for a different vision and approach to development is currently linked with human-centred and rights-based approaches. Amartya Sen⁸ developed a distinctive approach to development as the 'the process of expanding the real freedoms that people enjoy'. For Sen, development involves reducing deprivation or broadening choice. Deprivation represents a multidimensional view of poverty that includes hunger, illiteracy, illness and poor health, powerlessness, voicelessness, insecurity, humiliation, and a lack of access to basic infrastructure.⁹

He emphasize that development should go beyond the parameters of a monetized and highly economized world. It can be said that rethinking the concept of development beyond notion of primary economic growth to the real freedoms of people means that people are the most important stakeholder in development. This idea can be seen in the Human Development Reports (HDRs)¹⁰ which

7 According to DoSomething.org, a global movement of young people against poverty, nearly 1/2 of the world population -more than 3 billion people live on less than \$2.50 a day. More than 1.3 billion live in extreme poverty-less than \$1.25 a day. 1 billion children are living in poverty. <https://www.dosomething.org> accessed 10/11/2017

8 Sen, A. K. (1999a). *Development as Freedom* (New York: Anchor Books). A complete list of Sen's writings is available at <http://www.economics.harvard.edu/faculty/sen>.

9 Sen, A.K (1992). *Inequality Reexamined*. Cambridge , Mass: Havard University Press

10 Human Development Report (HDR) is an annual milestone published by the HDR Office of the United Nations Development Programme (UNDP), and at 2013 saw convergence in human development indicators (HDI). The first Human Development Report, was launched in 1990 by the Pakistan economist Mahbul ul Haq and Indian Nobel Laureate Amartya Sen and introduce the concept of human development, argued that the real purpose of development should be to enlarge people's choices. Subsequent Reports have developed the basic concept, looking in particular at how human development could be financed and at its international dimensions-through trade, official development assistance and international migration flows.

accentuate that development should be people-centred, and as such, attention should be given to redefining the kind of life they live. Development must be woven around people, not people around development- and it should empower individuals and groups rather than dis-empower them.¹¹

In support of the above claim, development, therefore, should address the problem of expanding person's capability to make valuable choices in life in order to improve the quality of that life. Development in this perspective is understood in liberationist terms; of removing unfreedoms- 'the domination of circumstances and chance over individuals' and of respecting and supporting individual agency and societal self-determination to decide on and pursue the flourishing life.¹² Sen posit that development pertains to positive processes of social, economic, and political change that expand valued capabilities.

Although development is most often associated with poorer countries, Sen's capability approach and the related human development approach apply equally to rich countries. Development in his view should be much concerned with the opportunities that people have to improve the quality of their lives. It is essentially a 'people-centred' approach, which puts human agency (rather than organizations such as markets or governments) at the centre of the stage.¹³ The crucial role of social opportunities is to expand the realm of human agency and freedom, both as an end in itself and as a means of further expansion of freedom.¹⁴ Principles such as human rights, equity, protection from downside risk, and others thus complement the principle of efficiency and capability expansion in this approach.

11 Human Development Report (1993) , New York Oxford Oxford University Press

12 *Ibid* at 8

13 *Ibid* at 8

14 Sen, A. K. (1983a). "Development: Which Way Now?" *The Economic Journal*, 93, 745.

Sen argues that expanding freedom, or capability, is both 'the primary end and principal means' of development. Freedom is central to development because the effective freedom to live a life one has the reason to value is intrinsically valuable and thus the best evaluative dimension of progress. But agency freedom is also the most effective means for development since it not only directly enhances well-being, but also enhances people's ability to help them and to improve their world.¹⁵ The implication is that individuals should not be treated as passive recipients of technocratic development schemes.

Sen's idea of development has been employed extensively in the context of human development, as a broader and deeper alternative to narrowly economic metrics like growth in Gross Domestic Product (GDP) per capita. Here 'poverty' is understood as deprivation in the capability to live a good life, and 'development' is understood as capability expansion. The novel focus of capability expansion is seen to be relevant for the normative evaluation of social arrangement beyond the development context, for example for analysing gender inequality and access to resources.¹⁶ It is also seen as providing foundations for an appropriate development policy framework and programme of action.

Since capabilities can be seen, broadly, as freedoms, this would seem to establish a basic connection to the concept of right to development. The United Nations (UN) Declaration on the Right to Development (R2D)¹⁷ conceptualizes development as a

15 *Ibid* at 9

16 Robeyns, I. (2000). An unworkable idea or a Promising Alternative?: Sen's Capability Approach Re-examined . Katholieke University Leuren Centre for Economic Studies Discussion Paper Series (DPS) (00.30).

17 United Nations Declaration on the Right to Development (1986) - The United Nations General Assembly adopted the Declaration on the Right to Development on 4 December 1986 (resolution 41/128). The Declaration proclaims that the "right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and

comprehensive economic, social, cultural and political process. It is aimed at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from.¹⁸ Article 10 of the UN Declaration on R2D call for measures to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

The principle of participation and inclusion is one of the cornerstones of the UN common understanding of a Human Rights-Based Approach- 'every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized'.¹⁹ Furthermore, according to the Declaration on the R2D, people not only have an inalienable right to development, but also to 'active, free and meaningful participation' in said development.²⁰ Office of the UN High Commissioner for Human Rights (OHCHR), emphasize that this right involves expressing

political development, in which all human rights and fundamental freedoms can be fully realized" (Article 1). It further proclaims that human beings are the central subject of development and thus should be the active participants and beneficiaries of the right to development, that an appropriate political, social and economic order for development should be promoted and protected, and that States have the right and the duty to formulate appropriate national development policies and ensure the fair distribution of the benefits resulting there from (Article 2). The Declaration reaffirms the indivisibility and interdependence of all human rights (Article 6).

¹⁸ United Nations Declaration on the Right to Development (1986)

¹⁹ See first Article of International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

²⁰ *Ibid* at 16

policy ideas, choosing policies, implementing, monitoring and evaluating policy.²¹

Human rights promotion and protection is therefore central to development. The UN Charter of 1945 and the Universal Declaration of Human Rights of 1948 require that all states recognize, establish, protect and enforce human rights at global, regional, national and local levels. Since their adoption, the recognition of the inherent dignity and the equal and inalienable rights of every person has forced the international community to recognise and assume its responsibility in the promotion of universal respect for and protection of human rights as well as to guarantee the indivisibility of human rights and their interdependence with peace and development. The Vienna Declaration and Programme of Action²² reaffirmed the right to development as "a universal and inalienable right and an integral part of fundamental human rights. R2D is specifically mentioned in the Copenhagen Declaration and Programme of Action adopted by the World Summit for Social Development.²³ In recent years the Commission on Human Rights

21 Office of the UN High Commissioner for Human Rights (OHCHR), *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet*, Synthesis

Report on the Post-2015 Sustainable Development Agenda:

http://www.un.org/ga/search/view_doc.asp?symbol=A/69/700&Lang=E

22 Vienna Declaration and Programme of Action (1993). The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the R2D, the human person is the central subject of development. The World Conference on Human Rights also affirms that State should cooperate with each other in ensuring development and eliminating obstacles to Development. Article 11 of the Declaration state that the R2D should be fulfilled so as to meet equitably the development and environment needs of the present and future generations.

23 World Summit for Social Development (1995). At the summit held in March 1996 in Copenhagen, Government reached a new consensus on the need to put people at the centre of development. The Social Summit was the largest gathering ever of world leaders at large (117 Heads of State or Government).

and the United Nations General Assembly has adopted a number of resolutions concerning this right. States are called upon to undertake further concrete actions at the national and international level to remove the obstacles to the realization of the right to development.

It is against this backdrop that the National Human Rights Commission of Nigeria (NHRCN) is seen as an essential and enviable institution in galvanizing the needed impetus towards the achievement and sustenance of the Sustainable Development Goals (SDGs) by 2030, which in turn will promote the fuller realization of human rights for all. The need to establish the NHRC arose at the 1993, World Conference on Human Rights.^{25,26} The Conference reaffirmed the important and constructive role played by National Institutions for the promotion and protection of Human Rights, in particular their advisory capacity to the competent authorities. The conference also affirmed other roles of human rights institutions, to include remedying human rights violation, the dissemination of Human Rights information and education in human rights. The world conference on human rights encouraged the establishment and strengthening of National Institutions, having regard to the

The Summit pledges to make conquest of poverty, the goal of full employment and the fostering of social integration overriding objectives of development. At the conclusion of the World Summit on Social Development, Government adopted a Declaration and Programme of Action which represent a new consensus on the need to put people at the centre of development.

24 *Ibid* at 19

25 Amnesty International, National Human Rights Institutions, Amnesty International's recommendations for effective protection and promotion of human rights, October 2001

26 The 1993 World Conference for Human Rights confirmed the important roles played by human rights institutions in the Vienna Declaration and Programme of Action. The Vienna Declaration referred to Paris Principles, and these were adopted by the UN General Assembly in December 1993

"principles relating to the status of National Institution"²⁷ and recognizing that it is the right of each state to choose the framework which is best suited to its particular need at the national level²⁸.

The Commission was established by the National Human Rights Commission Act 1995²⁹ but began its operation in 1996. This Act was reviewed due to some inadequacies and amended as the National Assembly in 2010, and signed by the President in 2011 as the National Human Rights Commission Amendment Act 2010. The Amendment Act provides the Commission with greater autonomy, expanded powers and functions.

Functions and Powers of the Commission

The National Human Rights Commission of Nigeria (NHRCN) Act 1995 as amended (2011)³⁰ expands the functions and powers of the Commission and confers the Commission with the independence to carry out these additional responsibilities. It also grants the Commission financial autonomy. The Preamble to the Act provides for the following:-

Independence in the conduct of the affairs of the Commission; the funds of the Commission to be a direct charge on the Consolidated Revenue Fund of the Federation; the establishment of the Human Rights Fund and the recognition and enforcement of the awards and recommendations of the Commission as decisions of the High Court.

Independence from government is an essential feature of national human rights institutions. The UN General Assembly has

27 Amnesty International public statement, *Human Rights Commission a Welcome First in South Pacific*, April 1998.

28 The Paris Principles Related to the Status of National Institutions for the Promotion and Protection of Human Rights, which were adopted by the UN General Assembly in 1993 (GA Res. 48/134), establish normative standards on the role, composition, status and functions of NHRIs.

29 Decree 22 of 1995, reprinted as CAP N46, LFN 2004

30 See the National Human Rights Commission Amendment Act, 2011

confirmed the principle of independence in many resolutions.³¹ Experience has indicated that it is easier to provide for financial autonomy, independence and powers of human rights institutions in national legal documents than it is easier to implement such provisions. To ensure the provision of what is provided is something else.³²

The functions of the Commission as Provided for in the Act

The NHRCN has three main functions. These are firstly, to promote the respect for human rights and a culture of human right; secondly to promote the protection, development and attainment of human rights; and thirdly, to monitor and assess the observance of human rights in the country.³³

In order to be able to carry its mandate, the Commission has been granted wide powers under the law. These include the power to investigate and report on the observance of human rights; to monitor and take steps to secure appropriate redress where human rights have been violated; to carry research; and to educate.

At the same time, the Commission has a duty to various tiers of government and its organs to offer advisory services, to examine of legislative provisions against international human rights standard; the publication of reports and opinions on any rights violations it decides to take up and all sorts of contributions to the implementation of international human rights standards in Nigeria.

31 See General Assembly Resolutions 54/176 of 17th December 1999, 52/128 of 12th December 1997 and 50/176 of 22 December, 1995

32 Sekaggya, M. (2004). Value of human rights Institutions: Human Rights Commission Process. Unpublished paper presented at the Regional Workshop on Human Rights Commission and Accountability in East Africa, organized by the East African Centre for Constitutional Development, Arusha. Margaret Sekaggya is a former Chair of the Ugandan Human Rights Commission and is currently a United Nations Special Rapporteur on the Situation of Human Rights Defenders.

33 See the NHRC Act, 1995 (as amended).

Investigations are a vital part of the work of national human rights institutions.³⁴ The Commission has the mandate to conduct investigations into allegations in response to complaints of human rights violations, and initiate investigations into situations that appear to raise human rights concerns. The Commission, over the years has conducted investigations that look at broad issues affecting the civil, political, social, economic and cultural rights of the citizens. Since inception, the Commission received a total number of One Million, Six Hundred and Forty Seven Thousand, and Three Hundred and Ninety Two (1,647,392).³⁵ In 2016 alone Complaints received over One Million and Ninety Nine Thousand, Nine Hundred and Nineteen (1,099,919) as against Four Hundred and Thirty Three Thousand, Eight Hundred and Sixty Five (433,865) in 2015.³⁶ This represents more than a 100 per cent increase. The implication is that the Commission has therefore tended to spend most of its time and resources addressing these with very little time spared for its strategic thinking. With the economic gap widening at a high speed, with the poor being further driven into poverty, the work and focus of the Commission is not likely to change.

The NHRCN has a Public Inquiry mandate. In the bid to achieve this mandate, the Commission held public inquiries on cases of demolitions in the North-Central States of Nigeria, viz the Federal Capital Territory (FCT), Niger, Plateau, Kaduna, Benue, Nassarawa and Kogi.³⁷ The Commission also held public inquiries on the clash between the Nigerian Army and Islamic Movement of Nigeria (Shiites) in Zaria, Kaduna state; oil spill and environmental pollution in Edo, Delta, Cross River, Rivers and Bayelsa States; and on alleged killings by the military in Tarok communities of Plateau and Benue States.³⁸ While some reports of the Panel of Inquiries are

34 *Ibid* at 28

35 See NHRC Annual Report, 2016

36 See NHRC Annual Report, 2015 & 2016.

37 See NHRC Annual Report, 2015

38 See NHRC Annual Report, 2016

yet to be made public, progress on others have being stalled by pending court cases by the alleged violators, challenging the powers of the Commission to constitute such a panel. The outcome of the court cases however will be instructive, as it would provide opportunity for the Commission to demonstrate her powers to deal with all cases relating to human rights as well as seek for appropriate remedy on behalf of victims. Some of the decisions of the Commission have been quite instructive, not only to the community, but to other institutions and authorities dealing with human rights issues in the country.³⁹

However, the enforcement of human rights remains a huge challenge. The Commission is confronted by various challenges. The first among these is the low level of education of the majority of people. This makes the promotion of human rights a mammoth task. Though the Commission has to prepare simplified information education and communication (IEC) materials and use radio/television programme in order to effectively communicate with the people, the lack of resources becomes a barrier.⁴⁰

Secondly, and connected to the first, is insufficient funding. The business of human rights promotion and protection is capital intensive. Human rights and their promotion and protection are not a priority in most African countries.⁴¹ Therefore, majority of human

³⁹ See NHRC Annual Report, 2014. The Commission investigated the Apo Killings that involved the killings of eight deceased persons as well as injuries to many by the Armed Forces of Nigeria (Army and Department of State Security). At the end, the Commission awards the sum of ten million naira to each of the deceased and five million naira to each of the injured survivors. The Commission also mandated the Honourable Attorney-General of the Federation and Minister of Justice to ensure that the evidence of payment is lodged with the Registry of the Commission within thirty days of the present decision.

⁴⁰ See NHRC Annual Report, 2015. In the preface of the Annual Report, Prof. Bem Angwe noted that the business of human rights promotion and protection is capital intensive.

⁴¹ Peter, C.M. Human Rights Commissions in Africa-Lessons and

rights institutions do not get the levels of funding which will allow them to operate optimally.⁴² This has forced the Commission to rely to a very large extent on funding from development partners. Funding is critical to address technical, personnel capacity and efficiency gaps, to recruit professionals with good remuneration to realize the mandate of the Commission. Bem Angwe⁴³ noted 'that with the expansion of the activities of the Commission through state offices, there is no doubt that with increased responsibilities, there is need for increased funding to the Commission'. Allocation of funds still remains insufficient for the volume of activities undertaken by the Commission, hence the need for improved funding. In developed countries, like Sweden, funding is not a key problem. However, in developing countries like Nigeria, where human rights institutions are highly dependent on government for funding, it is a basic challenge.⁴⁴

The third major challenge is the lack of political will by the politicians to promote and protect human rights. In most African countries, it is the politicians in power who are the forefront when it comes to supporting violations of human rights. They are not in a position, therefore to support any initiative to sensitize people about their rights. These political leaders may use their positions to stifle funding for the Commission, if they are not comfortable with its activities.⁴⁵

Another critical problem faced by the Commission is the lack of sufficient professionals to properly efficiently discharge their duties. For instance, albeit the task of monitoring and investigation are the

Challenges. *African YearBook of International Law*, 3:18. (2008).

42 See NHRC Annual Report, 2012

43 Prof. Bem Angwe is Immediate past Executive Secretary of the Commission. He was appointed on a 5 year term tenure which came to an end on 8th of December, 2016

44 Endale, Y. (2010). *The Roles and Challenges of Ethiopian National Human Rights Institutions in the Protection of Human Rights in the Light of the Paris Principles*. Central European University, Budapest-Hungary.

45 *Ibid* at 32

main roles of the Commission, it is an area in which there capacity gaps. Monitoring and investigation requires the availability of staff with requisite technical and professional capacity. The major reason for the absence of sufficient technical and professional staff members is lack of financial resources.

Over the years, the Commission has been overwhelmed by the many complaints filled by the citizens.⁴⁶ This requires that the Commission does have an institutional capacity and a team of skilled staff to collect evidence, conduct interviews, develop recommendations and report on their findings. This can be a challenging and confronting work for the Commission in view of insufficient funding.

Though the Commission has been carrying out activities in spite of these challenges, adequate funding is required to address the challenges of institutional and skilled manpower for optimal performance in the 21st century.

The SDGs 2015-2030⁴⁷

The Sustainable Development Goals (SDGs)⁴⁸ 49, 2015-2030 is a successor the Millennium Development Goals (MDGs) that elapsed in 2015. The Millennium Declaration, which was endorsed by the governments in September 2000, asserted that freedom, equality, solidarity and tolerance were fundamental values⁵⁰. It further declared that "we will spare no effort to promote democracy and

⁴⁶ See NHRC Annual Report, 2015 & 2016.

⁴⁷ For more information, visit the UN Division of Sustainable Development Goals website at <http://unstats.un.org/sdgs/>.

⁴⁸ *Ibid* at 39

⁴⁹ CESR and OHCHR (2013), Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda, at pp. 69-70.
<http://www.cesr.org/article.php?id=1482>

⁵⁰ UN General Assembly, "United Nations Millennium Declaration," September 18, 2000, A/RES/55/2,
<http://www.refworld.org/docid/3b00f4ea3.html> accessed September 10, 2013.

strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms.”⁵¹

However, these important human rights principles did not find their way into the new Millennium Development Goals (MDGs) that emerged from a UN working group in early 2001 and which quickly became the dominant international framework for development cooperation. The need to mainstream human rights into emergent international framework for development is seen as task that must be accomplished.

The MDGs were drawn from the Millennium Declaration and other international agreements, but were much more limited in scope by not giving sufficient attention to the principles of equality, non-discrimination, participation, accountability, the rule of law and the indivisibility of rights in all its strategies and policy framework.⁵² They gave priority to a subset of internationally recognized social and economic rights in areas like child and maternal mortality and access to primary education. The MDGs, however have failed to set targets in respect of political freedom or democratic participation, equality for ethnic minorities or people with disabilities, freedom of expression, or rights to peaceful protest or assembly, and they emphasized only limited elements of these social and economic rights. Though the Millennium Declaration adopted by world leaders in 2000 recognizes the essential linkage between human rights and development, no sufficient attention was given to aligning them. In 2010, the United Nations General Assembly High Level Plenary Meeting on the MDGs affirmed that common fundamental values including freedom, equality, solidarity, tolerance and respect for all human rights were essential in achieving the MDGs.⁵³ This was just five years to the expiry of the MDGs in 2015.

51 United Nations Development Programme (UNDP, 2014): Human Rights and the Millennium Development; Making the Link.

52 *Ibid* at 48

53 See UN Secretary-General's Independent Expert Advisory Group on a Data Revolution for Sustainable Development (2014), A World That Counts: Mobilising the Data Revolution for Sustainable Development. For a human

In the build up to the proposals for SDGs at the 2012 Rio+20 Conference, Member States emphasized their responsibilities to “respect, protect and promotes human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, or other status”⁵⁴. They also stressed the need to reduce inequalities and foster social inclusion and acknowledged that democracy, good governance and the rule of law, at the national and international levels are “essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger”⁵⁵.

The need to synthesise human rights-based post-2015 agenda was also affirmed in the UN Secretary General’s Synthesis Report of December 2014 which proposes that all elements of the new agenda be fully consistent with international law, and fully coherent with international human rights standards⁵⁶. The report makes explicit reference to economic and social, civil and political rights, and the rights to development, non-discrimination, personal security, labour rights, justice, democratic governance, free expression, association, assembly, the right to privacy, press

rights critique, see CESR (2014), ‘The data revolution: of the people, for the people?’, blog published November 2014.

- 54 Chairpersons of the United Nations Human Rights Treaty Bodies (2015), Joint Statement on the Post-2015 Development Agenda: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15505&LangID=E>
- 55 S. Kindornay and S. Twigg (2015), Establishing a Workable Follow-up and Review Process for the Sustainable Development Goal, Overseas Development Institute report: <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9635.pdf>
- 56 UN Secretary-General (2014), The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet, Synthesis Report on the Post-2015 Sustainable Development Agenda: http://www.un.org/ga/search/view_doc.asp?symbol=A/69/700&Lang=E

freedoms. Importantly, it calls for an analysis that recognizes that the problems that we are confronting (poverty, inequality, climate change etc) are not accident of nature but rather the results actions and omissions by actors in the public and private sectors.

The SDGs were adopted by UN Member States at a Special Summit convened at the UN Headquarters in New York from September, 25th – 27th 2015 in which 154 heads of states and government attended. The SDGs embrace a triple bottom-line approach to human well being; covering environmental, social and economic challenges and their ambition is to be global and inclusive. The SDGs are 17 and are fleshed out with 169 specific targets for action. The estimated price tag for achieving them is \$3 trillion.⁵⁷

On 1 January 2016, the world officially began implementation of the 2030 Agenda for Sustainable Development—the transformative plan of action based on 17 Sustainable Development Goals—to address urgent global challenges over the next 15 years. The SDGs agenda is a road map for people and the planet to ensure sustainable social and economic progress worldwide. The SDGs seeks not only to eradicate extreme poverty, but also to integrate and balance the three dimensions of sustainable development—economic, social and environmental—in a comprehensive global vision⁵⁸.

A thorough reading of the SDGs⁵⁹ reflected the following summation:

Goals Related to Economic, Social and Cultural Rights

Several goals focus on important economic and social rights areas such as poverty (Goal 1), food and nutrition (Goal 2), health (Goal 3), education (Goal 4), and water and sanitation (Goal 6). Most of these are not new to national development, although the way they

57 *Ibid* at 39

58 Ban Ki-Moon, (2016), United Nations Secretary General

59 *Ibid* at 46

are conceptualized is more holistic and in many respects better aligned with human rights provisions than under the MDGs. Given this close relation to economic and social rights standards (e.g. those enshrined in the International Covenant on Economic, Social and Cultural Rights), they fall squarely within the mandate of National Human Rights Commission of Nigeria⁶⁰. Section A of the NHRCN (Amended) Act, 2010, empowers the Commission to deal with all matters relating to the International Covenant on Economic, Civil and Cultural Rights and other international and regional human rights instruments to which the country is party to. The goals on the environment, climate change and natural resources (Goals 12, 13, 14 & 15) are also linked to human rights enjoyment, and therefore they could also be a focus of the Commission's work. This is even much so given the fact that Commission has a thematic area of focus on food security, climate change and the environment⁶¹. The thematic area provides a framework for the Commission in dealing with issues of human rights in these areas.

i. Goals Related to Civil and Political Rights

Central to the 2030 Agenda for Sustainable Development is the need to promote peaceful and inclusive societies based on respect for human rights, the rule of law and transparent, effective and accountable institutions. A number of regions have enjoyed increased and sustained levels of peace and security in recent decades. But many countries still face protracted violence and armed conflict, and far too many people are poorly supported by weak institutions and lack access to justice, information and other fundamental freedoms.

This goal touches on important human rights standards and principles, for example including targets on access to information

⁶⁰ See Section A of the NHRC Act, 2010 as Amended

⁶¹ See "About Us" 2016, a publication of the National Human Rights Commission of Nigeria, Abuja

and 'protecting fundamental freedoms'; participation in decision-making; non-discriminatory laws and policies; and access to justice. The inclusion of such commitments provides a much-needed recognition of the crucial role that civil and political rights play in making sustainable and equitable development possible and is another concrete entry point for the NHRCN to engage in national implementation of the SDGs. This entry point is also reflected under the Fundamental Rights provisions as provided for under the Constitution of the Federal Republic of Nigeria, under Chapter IV⁶². The Fundamental Rights under Chapter IV include:

- Right to life
- Right to dignity of human person
- Right to personal liberty
- Right to fair hearing
- Right to compensation of property compulsorily acquired
- Right to private and family life
- Right to freedom of thought, conscience and expression
- Right to freedom of expression
- Right to peaceful assembly and association
- Right to freedom of movement
- Right to freedom from discrimination on the grounds of ethnic group, place of origin, circumstance of birth, sex, religion or political opinion.

The role of national human rights institutions is also explicitly recognized as an indicator under Goal 16, with efforts to make national and international institutions more effective, inclusive and transparent with capacity to provide data on various forms of violence against children and other vulnerable groups, access to justice and public access to information.

62 1999 Constitution of the Federal Republic of Nigeria (as amended), Laws of the Federation of Nigeria, 1999 Chapter IV

The NHRCN Act (as amended) ⁶³, 2010 empowers the Commission to provide reports on the state of human rights promotion and protection in Nigeria, collect data on human rights generally, undertake research on matters relating to human rights. Section K of the NHRCN amended Act, 2010 also empowers the Commission to examine any existing legislation, administrative provision and propose bills for the purpose of ascertaining their compliance with human rights norms⁶⁴.

ii. Emphasizing the Principles of Equality, Non- Discrimination and Access for All

The need to address growing inequalities within and between people on the basis of sex, age, tribe, and religion, economic and political ideology has been repeatedly identified as a key priority, by states and civil society alike, throughout the process of formulating the SDGs. There are two goals that focus specifically on inequalities: Goal 5 on gender equality and Goal 10, which focuses on income inequality, exclusion (social, economic and political) and discrimination. The other goals and targets also include important language on equal and universal access (e.g. to healthcare, education, and energy) and tackling gender disparities – reflecting the core human rights principle of non-discrimination and equality. Persons with disabilities, older persons, indigenous peoples and children are also specifically named in some of the targets.

The rallying call underpinning the new agenda has been “to leave no one behind” - in reaction to the main critique of the MDGs: that they spurred important aggregate progress, but often at the cost of neglecting the most hard-to reach groups. In terms of monitoring the SDGs, special emphasis has been placed on the need for a ‘data revolution’, including more sensitive disaggregation of data along multiple lines that overlap with many of the prohibited

⁶³ NHRC Act, 2010 (as amended)

⁶⁴ NHRC Act, 2010 (as amended)

grounds of discrimination in international human rights law. The fact that tackling inequalities and discrimination is both a stand-alone and a mainstreamed objective in the new agenda clearly opens another important avenue of engagement by the NHRCN, who bring a distinctive expertise and experience on these issues—particularly given the explicit anti-discrimination mandate of the Commission⁶⁵.

The Role of NHRCN in Promoting and Protecting Human Rights in the Implementation of the 2015-2030 Sustainable Development Goals (SDGs)

The NHRCN is well placed to play unique and bridging roles—between the Federal, State and Local Governments, other national and international spheres; between different government institutions; between government and civil society; and across rights. This role is particularly important in the context of the ambitious and wide-ranging post-2015 sustainable development agenda. Collaboration between a variety of actors and sectors (different branches and departments of government; civil society; donors and development partners; UN agencies and mechanisms) will be absolutely essential for the goals' effective and equitable implementation.

Under the Paris Principles,⁶⁶ the NHRCN is mandated to perform a broad range of functions. These can be generally categorised as: research and advice; education and promotion; monitoring; investigating; conciliating and providing remedies; cooperating with other national and international organisations; and interacting with the judiciary and other security agencies. Each of these functions could be leveraged to make distinctive and valuable contributions to the implementation and monitoring of the SDGs.

65 NHRC Act, 2010 (as amended)

66 The Paris Principles Related to the Status of National Institutions for the Promotion and Protection of Human Rights, which were adopted by the UN General Assembly in 1993 (GA Res. 48/134), establish normative standards on the role, composition, status and functions of NHRIs.

National implementation of the SDGs therefore presents the NHRCN with different opportunities for engagement.

a. Promoting the Mainstreaming of Human Rights in National Implementation Plans

While the agenda is universal, certain targets, benchmarks and indicators will need to be 'tailored' or further developed at the national level to reflect different national contexts. The NHRCN's bridging role, as described above, uniquely positions the institution capacity to ensure the tailoring process upholds the principles of inclusion, participation and non-discrimination.

Educating rights-holders, civil society groups, relevant ministries, parliamentarians, national statistical offices and other stakeholders about the human rights dimensions of the SDGs is an important first step for this. It is a function that falls squarely within the mandate of the NHRC, to undertake outreach work to enable marginalized communities to understand and claim their rights. The NHRC Act 2010 (as amended)⁶⁷ empowers the Commission to promote an understanding of public discussions of human rights issues in Nigeria as well as liaise and cooperate with local and international organizations on human rights with the purpose of advancing the promotion and protection of human rights⁶⁸. The NHRC can also promote nationally-tailored targets, benchmarks and indicators that are aligned with human rights obligations, as well as setting out principles and criteria for tailoring, informed by human rights considerations. In this regard, the Commission can draw on a wealth of experience in building the capacity of government bodies to apply a human rights-based approach to development and in engaging in consultative processes for priority-setting, policy-making, planning and budgeting in a variety of sectors—both locally and nationally. The mandate of the Commission as provided for

⁶⁷ See Section E, F, and G of NHRC Act, 2010 (as amended)

⁶⁸ NHRC Act, 2010 (as amended)

under the NHRC Act (as amended), 2010 enjoins it to undertake studies on all matters pertaining to human rights and assist the Federal, State and Local Governments in the formulation of appropriate policies to guarantee of human rights. The NHRC Act also empowers the Commission to examine any existing legislation, administrative provisions and proposed bills or bye-laws for the purpose of ascertaining their consistency with human rights norms⁶⁹. This is an important mandate that the Commission can utilize towards achieving the SDGs in Nigeria.

b. Advising Governments on Rights-Centred Implementation

By assessing how laws, policies, administrative practices and budgets impact on civil, political, economic, social and cultural rights, the NHRC is in a unique position to provide valuable advice to governments on how to contextualise and operationalize human rights norms⁷⁰. This function will be essential for ensuring that human rights considerations are not neglected in the SDGs -2015-2030 context. For instance, NHRC could conduct human rights impact assessments of specific policies and programmes proposed or put in place to implement the goals.

Achieving the SDGs will require unprecedented financial resources; while official development assistance (ODA) will remain essential for some countries, fairer and more effective domestic resource mobilization has been widely accepted as a crucial means of financing the goals. For this reason, assessing whether these resources are being raised and used in human rights-compliant ways

⁶⁹ NHRC Act, 2010 (as amended)

⁷⁰ Broadly defined as quasi-governmental, administrative institutions (neither judicial nor law-making), NHRIs have an on-going advisory authority in respect of human rights. See A. Corkery and D. Wilson (2014), 'Building Bridges: national human rights institutions and economic, social and cultural rights', in Riedel et al (eds.) *Economic, Social and Cultural Rights in International Law: contemporary issues and challenges*.

will be critical. Building up NHRC's expertise in evaluating whether public budgets (e.g. spending on health or education) reflect the obligation to dedicate maximum available resources to economic, social and cultural rights could assist governments in advancing more equitable financing for sustainable development.

c. Monitoring and Holding Governments to Account for Poor or Uneven Progress

Once implementation gets underway, ensuring that all tiers of government and institutions are accountable for their SDG commitments will be essential in achieving equitable, effective and rights-compliant progress towards the goals. The NHRC experience in monitoring human rights is directly applicable to tracking sustainable development successes and setbacks, and they can therefore make a unique contribution as part of the multi-layered accountability architecture currently being conceptualized for the SDGs.

There is broad agreement that establishing robust and inclusive national-level review processes to monitor SDG progress will be of primary importance. Many governments are already starting to consider the form and function of these mechanisms. The NHRC therefore have an important opportunity to advocate for and advise on national mechanisms that are truly participatory and capable of strengthening meaningful accountability between the State and its people. Once the national monitoring and review process gets underway, the Commission should have an officially recognised role. The exact model of the Commission engagement could include, for example: taking responsibility for monitoring a sub-set of the goals/targets; taking part in multi-stakeholder monitoring mechanisms; or submitting independent assessments to parliamentary reviews.

d. Alternative Options for Monitoring

SDG implementation at the local, state and federal level could also benefit from the Commission involvement, including reviews at the National, Regional and UN regional commissions, peer-review mechanisms, and thematic bodies focusing on particular goals.

The NHRC can leverage its experience of rights monitoring to positively influence the design and performance of mechanisms for monitoring SDG implementation in a number of ways in Nigeria. First, the NHRC would have to increase demand for the collection of relevant statistics from government departments and in some cases even collaborated directly with national statistical offices. Second, the Commission can work to provide an independent source of information and a distinctive lens to analyse that information, which can be used to evaluate whether efforts to achieve the SDGs are respecting, protecting and fulfilling human rights - and in tracking the implementation of previous recommendations of any monitoring mechanism. Third, as discussed above, the Commission convening role to supports affected communities to share their experiences and express their views, vital perspectives in monitoring the extent to which SDG progress is equitable and rights-compliant. Indeed, the SDGs' strong emphasis on 'leaving no one behind', will necessitate cross-cutting measures to improve the social, political and economic inclusion of disadvantaged and marginalized groups - and robust monitoring of progress.

e. Uncovering Patterns of Inequality and Discrimination

The core mantra of the SDGs agenda is to "leave no one behind". Human rights standards on equality and non-discrimination provide a detailed normative framework for making this rhetoric more of a reality. By virtue of its broad mandate⁷¹, the Commission is well-placed to look into systemic or structural problems with regard to inequality and discrimination—e.g. on the basis of disability, age,

71 NHRC Act, 2010 (as amended)

gender and ethnicity—and indeed have long experience in doing so. Different functions, in particular their reporting function, can be used to bring to light disadvantages and persistent inequalities faced by particular groups, including in remote settings. Highlighting uneven progress on the SDGs, which may be hidden when looking at national averages, will be an immensely valuable contribution to realizing the ambition of the goals.

f. Securing redress for Victims of Development-Related Rights Violations

The NHRC have quasi-judicial mandates to receive complaints or initiate investigations, meaning the Commission can play a crucial role in ensuring accountability and access to justice, including for people and communities whose rights are violated by development-related activity. The Commission have the capacity to conduct investigations, national inquiries, and audits into a broad range of alleged human rights violations, including on the causes of disease outbreaks; serious breakdowns in service delivery; abuses of land rights of indigenous people; and mismanagement in procurement affecting public services and rights fulfilment.

The exercise of the Commission's quasi-judicial mandate in the SDGs context will be important to ensure that the rush to meet the SDGs does not lead to actions which may threaten or violate individual rights. An increasing number of Human Rights Institutions are focusing on the role of the private sector in relation to human rights, applying the UN Guiding Principles on Business and Human Rights in this context need to be strengthened. The ability of the Commission to receive complaints concerning business-related abuses is important in light of the increasingly privileged role accorded to the private sector in the international development agenda and the need to diversify the economy by the present President Muhammadu Buhari's administration.

Conclusion

While country contexts and institutional capacities vary widely, the work and mandates of National Human Rights Institutions (NHRIs) in all countries at all levels including Nigeria are of critical relevance to the achievements and sustenance of SDGs. However, it has to be acknowledged that NHRIs like Commission face obstacles when it comes to promoting and protecting human rights accountability in resource constrained contexts, including constraints on the assertion of its independence, limited technical and financial capacity. In order to unleash the potential of the Commission, these barriers will have to be lifted. States and other sources of supports, especially from the international community to the Commission is urgently needed to strengthening and enhancing its capacity as a worthwhile investment in a very distinctive and constructive part of the SDGs implementation and accountability architecture.

THE IMPLEMENTATION OF THE RIGHT OF CHILDREN WITH DISABILITIES TO EQUAL AND ADEQUATE EDUCATION IN NIGERIA

By

Emenike Olisa Mbanugo

Abstract

Relevant laws in Nigeria provide for the right of children with disabilities to access equal, adequate and inclusive education to enable them live independently and contribute their quota to national development. However, for children with disabilities, exclusion from public and private schools is the norm rather than the exception as they live in denial of this right despite the avalanche of legislation. The proposed Disabilities Bill with its inadequacies flaunted as the panacea for disability rights has stagnated after passage by the two Chambers of the National Assembly, a signpost that the right of children with disabilities to equal and adequate education is not guaranteed as a right, but considered as a charity or welfare benefit.

This paper examines Nigerian law, policy and practice with respect to the implementation of the right to education for children with disabilities and attempts to make appropriate recommendations for legal and policy reforms. With the likelihood that children with disabilities are the most excluded social group in Nigeria today, the paper attempts to show that children with disabilities are not considered nor included in Nigeria's implementation plans of two major initiatives, namely, Education for All and the Millennium Development Goals now Sustainable Development Goals.

The paper reviews the application of international best practices in the delivery of education to children with disabilities with emphasis on the United Nations Convention on the Right of Persons with Disabilities and the situation in a few other jurisdictions. Effort is made to suggest ways of ensuring the implementation of the right of children with disabilities to adequate education within the existing legal framework.

Introduction

Education can be defined as the process of passing the knowledge of a people from generation to generation. It can also be described as the process of teaching and training usually from infancy;¹ or instruction to strengthen the powers of body and mind.² Most nations of the world and the United Nations under the umbrella of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) have prioritised education as a right for every citizen and as an instrument of nation building and development.

Nigeria has sufficient legal framework to ensure the protection of the right of its citizens to equal and adequate education as envisioned by her Constitution and other laws. The same assertion cannot, however, be made with respect to its machinery for the implementation of the existing laws especially for children with disabilities. The importance of the right of access to equal and adequate education by all citizens is underpinned by the educational objectives of the Federal Government as contained in the 1999 Constitution of the Federal Republic of Nigeria³. The Child Rights Act 2003 (CRA) and the Compulsory, Free Universal Basic Education Act 2004 (UBEC) respectively⁴ provide that every child has the right to free, compulsory and universal basic education and it shall be the duty of government to provide such education. This is perhaps because it is considered a veritable tool for the attainment of national development and individual total well-being. The only exception to this right is with respect to children with mental disability⁵.

Basic child education will only be meaningful if it is available to all children across the whole spectrum of society – rich, poor, able or disabled etc. To achieve this, government has produced a

1 Chambers Encyclopedic of English Dictionary, 1994, Page 401.

2 Chambers 20th Century Dictionary, 1983, Page 398.

3 Section 18

4 Section 15(2); Section 2(2)

5 Section 15 (7)

policy document⁶ which articulated the processes leading to the implementation of this objective. The aims of the Policy⁷, among others, is to provide access to education *for all persons*, in an *inclusive setting*⁸; to *equalize educational opportunities* for all persons irrespective of their genetic composition, social, physical, sensory, mental, psychological or emotional disabilities⁹ and provide *adequate education* for all persons with special needs in order that they may fully contribute their own quota to the development of the nation¹⁰. Whether this laudable objective has been put into action by the various levels of government and agencies charged with responsibility for the implementation of the policy at all levels is yet to be seen.

The Child Rights Act (CRA) defines a child as a person under the age of 18years¹¹ whereas the UBEC defines a child or ward as a person of primary and junior secondary school age who is between the age of 6years and 16years *whether disabled or not*¹². Although there is disparity in the laws of the various States of the Federation with respect to the actual age of the child with some States stipulating 13years and others 15years, most States which have adopted the Act as law have adapted to 18years. It is settled that where the law of the States is inconsistent with any Federal law *validly made* by the National Assembly, the States' law shall to the extent of the inconsistency be void¹³. The assumption of this paper therefore is premised on 18years as the age of the child.

There appears, however, to be insufficient data as to the population of children in Nigeria. What is however known as a fair estimate is that persons below the age of 16years constitute about

6 The National Policy on Education, 2013, 6th Edition, NERDC Printing Press.

7 *Ibid*, Section 7, Paragraph 119, Page 53

8 Para 119a

9 Para 119b

10 Para 119c

11 Section 277

12 Section 15

13 Section 4(5)

35% or 63,000,000 of Nigeria's population out of which about 30million are out of school despite the promulgation of the Universal Basic Education Act¹⁴. This is nearly 50% of the entire child population. It is noted that the National Human Rights Commission (NHRC) Report did not indicate the population of children with disabilities that make up the total number of persons with disabilities who have below average access to education. It also did not state the percentage of the population of children with disability out of the 35% that make up the population of Nigeria nor indeed the population of children with disabilities of the total population of children out of school. It would be extremely important to have these figures as they are crucial to the realisation of any planning and implementation scheme geared towards achieving equal and adequate education not only for children with disabilities but indeed the whole nation.

These figures may be difficult to ascertain because the Nigerian State does not consider disability benefit as a right but as charity and welfare benefits, contrary to law and social justice. The government therefore neither provides nor engages institutional infrastructure to secure the rights of children with disabilities to equal, functional, qualitative, available, accessible and adequate education. The realities on the ground are quite frightening and disturbing with twelve States of the Federation yet to adopt and enact the Child Rights Act in their jurisdictions more than 14years after it became Federal law and nearly thirty years after the Convention on the Rights of the Child was adopted by the United Nations.¹⁵ The Disabilities Bill with its deficiencies and scantiness

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- 14 National Human Rights Commission (NHRC) Individual Report on the State of Compliance with International Minimum Standards of Human Rights by Nigeria under the Universal Periodic Review Mechanism submitted to the United Nations Commission on Human Rights for review at the 2nd Cycle, 17th session in October 2013.
- 15 Presently only 24 States in the Federation have enacted the Child Rights Law with Enugu State being the last to do so in December 2016. THIS DAY, June 1, 2017 available at

compared to the Convention on the Rights of Persons with Disabilities seems to be in perpetual limbo after it was passed by the two Chambers of the National Assembly under two different administrations in 2015 and 2017. In fact, the idea of compulsory, free and adequate education to children with disabilities and their families is a mirage and virtually non-existent as families who are determined to give even minimal education to their children have been pauperised by their quest. A large percentage of children with disabilities are noticeably from poor and low income families resulting in many of them being turned into weapons of begging for family sustenance while budgetary allocations to the education sector refuse to edge towards the United Nations specification for State parties.

In the midst of these deficiencies and the inefficiency of government apparatus, the cost of education for children with disabilities has soared beyond acceptable limits. Payment for therapies, assistive educational materials and physical aids outstrip their already poor and overstretched meagre resources and except urgent steps are taken to redress the imbalance, the situation will deteriorate to abuse. There is a total dearth of trained special education teachers and the available workforce are over-stretched, overwhelmed and discouraged with motivation at its lowest ebb. Most writers on child rights across the land scarcely make mention of the situation of Nigeria's children with disabilities¹⁶ and are either nonchalant about the existence of children with disabilities or feel

www.thisdaylive.com/index.php/2017/06/01/unicef-calls-for-adoption-of-child-rights-act-in-all-states/The 12 states that are yet to enact the law are Adamawa, Bauchi, Borno, Gombe, Kaduna, Kano, Katsina, Kebi, Sokoto, Taraba, Yobe and Zamfara States.

- 16 For instance, Onyemaechi TU "Children, Status and the Law in Nigeria" Vol. 4(3a)July, 2010 *African Research Review* Pp. 378-398 Copyright © IAARR, 2009; www.afrrevjo.com/Indexed-African-Journals-Online; www.ajol.info accessed at 10.05 p.m. on Monday, 04/09/2017 made no mention at all of the status of children with disabilities even though the Convention on the Rights of Persons with Disabilities had been passed in 2009 before his publication.

greatly overwhelmed by their plight that they consider the attribution of any right, much less equal right, to them utopian, notwithstanding the avalanche of global awareness, municipal legislation, regional norms and international law which address the subject.

Legal Framework For The Right To Child Education In Nigeria

The legal framework for the right to equal and adequate education is underscored by the stream of domestic, regional and international legislations and laws enacted and ratified by governments to actualise a literate society as a beacon for nation growth and development. *Nigeria has shown robust legislative activity in the enactment of laws and regulations to actualise the vision of Education for All for its citizens.* States, local governments, Churches and other non-governmental organisations who are stakeholders all have policies guiding the provision of education to the populace within their own sphere of influence¹⁷. Regrettably, this has not translated into any meaningful activity in the implementation process especially as it affects the right of children with disabilities. Public schools have failed to provide access to equal and adequate education to children with disabilities as provided by law while most private schools outrightly reject their admission into their schools with basic challenges of stigmatisation. In some cases, parents of non-disabled children threaten to withdraw their children from private schools since they find it objectionable that their children shall sit together in classrooms. Apart from the Constitution of the Federal Republic of Nigeria 1999, the Child Rights Act, the Compulsory, Free Universal Basic Education Act, and the National Policy on Education, there are of course the African Charter on Human and Peoples' Rights, the

17 One of the pillars of the Catholic Church philosophy on education as stated in its 2005 policy stipulates that Catholic Education is the sacred task of forming the character of a child and aiding him/her to attain the purpose of existence.

African Charter on the Rights and Welfare of the Child, and other international laws and norms including the Sustainable Development Goals, etc. which guarantee the right to education for Nigerian citizens especially children with disabilities.

The 1999 Constitution

The Constitution provides that government shall direct its policy towards ensuring the provision of equal and adequate educational opportunities at all levels.¹⁸ In furtherance of this, government shall strive "when practicable" to provide free compulsory and universal basic education, free secondary education, free university education and free adult literacy programme.¹⁹ It is notoriously contended that the Constitution ousts the jurisdiction of the courts to interrogate the non-implementation of provisions of the Constitution as contained in Chapter II including the provisions on education.²⁰ It is submitted with respect that this contention is no longer valid having regard to a true and proper construction of Section 13 of the Constitution which specifically mandates by duty and responsibility, all organs of government and all authorities and persons exercising legislative, executive and judicial powers to conform to, observe and apply the provisions of that Chapter of the Constitution. As we will demonstrate in this paper, the right to education is inexorably linked to the right to life guaranteed by the Constitution²¹ and is infinitely reduced to the crucible required for independent living and quality of life. It has been said that the right to life presupposes the existence and availability to all of certain basic facilities such as food, health, shelter and education.

¹⁸ Section 18(1) 1999 Constitution

¹⁹ Section 18(3)

²⁰ Section 6(6)c

²¹ Section 33(1)

Statute Law

In furtherance of the powers vested in the National Assembly to make laws for the peace, order and good government of Nigeria,²² the National Assembly has enacted the Child Rights Act²³ and the Compulsory, Free Universal Basic Education Act²⁴ both of which specifically provide for the right of *every* child to compulsory, free and universal basic education²⁵ and criminalises parents and guardians who fail to ensure that their children or wards complete primary and junior secondary education.²⁶ However, the CRA did not define basic education which the UBE Act defined as "early child care and education, the nine years of formal schooling, adult literacy, and non-formal education, skills acquisition programmes and the education of special groups such as nomads and migrants, girl-child and women, almajiris, street children and *disabled groups*."²⁷ But the CRA provides that every child is vested with supplementary rights to the fundamental rights contained and guaranteed in Chapter IV of the Constitution²⁸ and these supplementary rights are set out in the Act,²⁹ beginning with the right to survival and development, right to health and health services, leisure, creation and cultural activities; parental care, protection and maintenance; education; special protection measure; and even contract.

In simple terms, Nigeria has by law evinced the intention that children with disabilities shall be provided *compulsory*, free universal basic education as of right and no longer as an objective which government shall direct its policy towards. It is submitted that the object of the legislator in making the supplementary rights an addition to the guaranteed rights under the 1999 Constitution and

22 Section 4(2)

23 2003

24 2004

25 *Ibid.*

26 Section 15(6) 2003; Section 2(4) 2004

27 Section 15

28 Section 3

29 Section 4, 5, 12, 13, 14, 15 and 16

"under any successive constitutional provisions"³⁰ is to clothe those rights with constitutional immunity and, accordingly, it is submitted that any future constitutional amendment should transfer these rights to Chapter IV rights and accord them the same status as fundamental human rights. However, it is submitted that the intention of the provisions of the two laws did not adequately correspond with the underlying principles of the Convention on the Right of the Child³¹. The thrust of the provisions of the Convention is the development of the child's personality, talents and mental and physical abilities to their fullest potential; the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; the development of respect for the natural environment.³²

It is submitted that the above agreement of States Parties which is nowhere reflected in the Acts ought to have been fully captured in the two laws as an indication of a progressive will to implement the laws. As Nigerian law has not defined the term "right to life", it is submitted that the above attributes sufficiently point to the indices of the components of the right to life. The criminalisation of the right to education by compelling parents to ensure the education of their children at the pain of imprisonment derogates from the object to direct education to the development of respect for parents and demonstrates sheer brutal force. This approach is repugnant to societal values and norms which devolve around parents providing

³⁰ Section 3(2)

³¹ United Nations Convention on Rights of the Child 1989, Article 28

³² Article 29

some form of education, formal and non-formal to equip their children and wards for survival and development. No doubt, this sanction has not translated to all parents providing the required education or any education at all as children of universal basic education age are found during school hours hawking goods and doing menial jobs while government officials zoom past in tinted glass vehicles as if evading the loathsome glare of the children.³³

It is submitted that as society evolves from primitive and draconian times to the current global order, the pursuit of obedience to law at the pain of sanction is retrogressive and usually counter-productive. The fact remains that education has been substantially commercialised in Nigeria and government itself has failed to meet up with the educational demand of Nigerian citizens as a matter of obligation to the people thereby setting up poor and disadvantaged parents for indictment on account of their failure to do what the State could not do. It is submitted that as long as the State continues to renege on its obligation to provide suitable learning environment, train and re-train teachers, overhaul decrepit facilities and review the infrastructural architecture of education in Nigeria, it cannot morally justify the criminalisation of parents whose children drop out of school for a myriad of reasons.

In other words, the attainment of the right to education by children with disabilities, and indeed all children, is child centred-based and directly linked to the child's right to life already secured as a fundamental right by the Constitution.³⁴ The implementation process, therefore, should show the effort being made to ensure that the intention of the legislature is given effect in full. In the absence of any information regarding the steps taken to accord the right to equal and adequate education to children with disabilities, it is safe to conclude that no measure has been put in place to execute the

33 Chinyere Amalu, Nigeria and the State of the Child Rights Act, *Vanguard*, June 29, 2010 accessed at <https://www.vanguard.com/2010/06/nigerian-child-and-the-child-rights-act/>

34 1999, Section 33

mandatory provisions of law which in substance amount to an institutional violation of the fundamental rights of this class.

The African Charter on Human and Peoples' Rights

This Charter was enacted into law in Nigeria by the National Assembly as The African Charter on Human and Peoples' Rights (Ratification and Enactment) Act 1983³⁵ pursuant to the powers vested in the National Assembly to enact treaties entered into by Nigeria as law.³⁶ It is contended that treaties enacted as law by the National Assembly have force to the extent to which it has been so enacted by the Assembly. Accordingly, it is submitted that the African Charter on Human and Peoples' Right has the full force of law in all its ramifications as the whole Charter without any modification was adopted into Nigerian law by the National Assembly. It is safe to conclude that the right to education guaranteed by the Charter³⁷ had indeed become recognised as an existing fundamental right with substantive force of law since 1983 and should therefore have been included in Chapter IV of the 1999 Constitution. This fact has received judicial pronouncement in decisions of the Supreme Court of Nigeria which will be discussed anon.

The reach of the African Charter Act is quite encouraging as it is contemporaneous with the regional law and implicitly vests concurrent jurisdiction in both the appropriate Nigerian courts and the regional ECOWAS Court to adjudicate on the rights enshrined therein including the right to education.³⁸ Children with disabilities, their guardians, families and caregivers can therefore, enforce the Act in the Nigerian Court utilising the fundamental rights enforcement procedure³⁹ and may also approach the ECOWAS

³⁵ Cap. A9, Laws of the Federation of Nigeria 2004

³⁶ Section 12 of the 1979 Constitution of the Federal Republic of Nigeria

³⁷ Article 17 (also Section 17 of Cap. A9)

³⁸ *Serap v. Federal Republic Of Nigeria & Anor.* ECW/CCJ/APP08/08 delivered on 27/10/09 available at r2c.gn.apc.org/node/717 accessed at 10.18pm on Sunday 27/08/2017

³⁹ Fundamental Rights (Enforcement Procedure) Rules 2009

Court for the same purpose and the ECOWAS Court need not refer them to the State Court. The advantage of the regional court in the face of the slack approach of national courts is phenomenal as it is less bureaucratic and not saddled with municipal politics, fear of victimisation and elongated cause lists. The implication is that Nigeria's organs of government vested with legislative and judicial powers already conform to, observe and apply the principles of fundamental rights to education whereas the executive organ vested with the power of implementation, has failed woefully to execute its constitutional mandate.

The African Charter on the Rights and Welfare of the Child⁴⁰

Although Nigeria fully ratified this Charter, it still has not activated the provisions of Section 12 of the 1999 Constitution to adopt it as a municipal law even though it could be said that the provisions of this Charter and the Convention on the Rights of the Child greatly influenced the provisions of the Child Rights Act. It clearly asserts that a child is "every human being" under 18 years⁴¹ and that the child has a right to live⁴². The description of a child as a *human being*, in my view, is an endorsement that every right which a child with disability is entitled to is an inalienable right accruing to a living being and not some form of patronising hand-out or welfare package. This is more acutely captured by the right to education guaranteed by the Charter.⁴³ The Charter provides:

Article 11:

Every child has the right to an education, to develop his or her personality, talents and mental and physical abilities to their fullest potential. This education also includes the preservation and strengthening of positive African morals, traditional values and

40 The Charter was signed by Nigeria on 13th July 1999, ratified on 23rd July 2001 and deposited on 2nd May, 2003.

41 Article 2

42 Article 5

43 Article 11

cultures. Governments should also take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Article 13:

Every child who is mentally or physically disabled has the right to special protection to ensure his or her dignity, promote his self-reliance and active participation in the community.

In comparative terms, it is submitted that the Charter clearly out-strips the CRA in the provision of education for children with disabilities in pursuit of the objective which education is intended to achieve. Indeed, the Charter is more contemporaneous with the provisions of the CRC and the Convention on the Right of Persons with Disabilities. Whereas the Act is focused on compelling compulsory, free universal basic education for the child, the Charter is focused on "an education" directed *to develop his or her personality, talents and mental and physical abilities to their fullest potential* by moral suasion; whereas the Act envisions that special protection for children with disabilities shall be for a "child who is in need" on a measure *appropriate* to her disability, the Charter, perceiving that every child with disability deserves special protection, mandates that the nature of special protection required shall ensure his or her dignity, promote his self-reliance and active participation in the community.

It would seem that even as the giant of Africa, Nigeria views the rights of its children particularly children with disabilities without any interest or commitment despite claims in political, economic, cultural, and pseudo-communal settings that "our children are the future of tomorrow". The Federal Government appears, with respect, to have foisted the obligation and responsibility for the education of children with disabilities on traumatised and pauperised parents and guardians, adversely devastated by the weak and fragile economic structure hoisted on the nation by mismanagement and leadership deficit, without any support.

The United Nations Convention on the Right of Persons with Disabilities

Nigeria ratified and acceded to the United Nations Convention on the Right of Persons with Disabilities and its Optional Protocol on September 24, 2010.⁴⁴ Deriving from the Preamble to the Convention⁴⁵, which confers on children with disabilities the full enjoyment of all human rights and fundamental freedoms on an equal basis with other children, which also form part of the obligations undertaken by States Parties under the Child Rights Convention,⁴⁶ the Convention on the Rights of Persons with Disabilities (CRPD) espoused as part of its general principles, a respect for the *evolving capacities* of children with disabilities and respect for the right of children with disabilities to *preserve their identities*.⁴⁷ It could be seen that the thrust of the CRPD both from its Preamble and Principles, among others, is the restoration of the dignity of children with disabilities. This is apparently in recognition of the fact that "human rights and fundamental freedoms" are inalienable rights which strike at the core of life and existence of any living being and the realisation of her individual life long goals and support for nation building.

More specifically, the CRPD mandates that States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children;⁴⁸ that in all actions concerning children with disabilities, the best interests of the child shall be a

44 The convention was adopted by the United Nations on December 13, 2006 and opened for signature on March 30, 2007 after it was ratified by the 20th Party State. It came into force on May 3, 2008 and as at April 2017, 113 Party States have ratified the Convention.

45 Paragraph (r)

46 The United Nations Convention on the Rights of the Child 1989 which came into force on September 2, 1990

47 Article 3(h)

48 Article 7(1)

primary consideration;⁴⁹ and that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.⁵⁰ It is significant that the provisions of the Convention recognise that children with disabilities shall be accorded the right to express their views freely, the realisation of which is not attainable in the absence of equal access to adequate education with age-appropriate assistance. In recognition of this, the CRPD recognises the right of children with disabilities to education⁵¹ and sets out in detail the measures which States Parties shall adopt to realise the right to education without *discrimination and on the basis of equal opportunity*. To realise this objective, it provides that States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to the full development of human potential and sense of dignity and self-worth; and the strengthening of respect for human rights, fundamental freedoms and human diversity; the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and enabling persons with disabilities to participate effectively in a free society⁵².

The provisions of the CRA and the UBEC are oceans apart from that of the CRPD. More importantly, the CRPD mandates that States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.⁵³ It is submitted that

49 Article 7(2)

50 Article 7(3)

51 Article 24

52 Article 24(1)

53 Article 33

mandating States Parties to designate focal points for the implementation of the *present Convention* is nouvelle in International law, and underscores the level of importance placed on the Convention and its effective implementation.

Because of the importance of the provisions of Article 24 to this discourse, the relevant portions are reproduced hereunder:

"Article 24"

Education

1. *States Parties recognize the right of persons with disabilities to education. With a view to realizing this right without discrimination and on the basis of equal opportunity, States Parties shall ensure an inclusive education system at all levels and lifelong learning directed to*
 - a. *The full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;*
 - b. *The development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;*
 - c. *Enabling persons with disabilities to participate effectively in a free society.*
2. *In realizing this right, States Parties shall ensure that:*
 - (a) *Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;*
 - (b) *Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;*
 - (c) *Reasonable accommodation of the individual's requirements is provided;*

- (d) *Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;*
- (e) *Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.*

Most parents and guardians raising children with disabilities would desire that Article 24(2) is implemented as part of Nigerian law as their children are bluntly denied their right to education in most private schools and technically rejected in public schools where there are no facilities to support them or provide "reasonable accommodation for the individual's requirements"⁵⁴.

"The Disabilities Bill"

Not too long ago, persons with disabilities cordoned off the ever busy Benin – Asaba expressway to call attention to their plight and protest the prolongation of the passage of the "Disabilities Bill" into law. It is my view that the object of this Bill is to comply with the agreement of State Parties to the CRPD⁵⁵ that States Parties shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels⁵⁶. The objective of the Bill is twofold: integrate persons with disabilities into the society, and establish a Commission for persons with disabilities and vest it with responsibilities for their education, health care, and the protection of their Social, Economic and Civil Rights.

It is submitted that the objective of the Bill to "integrate persons with disabilities into the society" is an acknowledgment of the exclusion of this group from our national life and therefore a

⁵⁴ Article 24(2)(c)

⁵⁵ United Nations Convention on the Rights of Persons with Disabilities 2009

⁵⁶ *Ibid* Article 33

violation of the right to freedom from discrimination by reason of the circumstances of their birth.⁵⁷ The choice of the word "integrate" belies the contention that the group has never been included in the scheme of things or in the development plans of successive Nigerian governments at all levels. The word "integration" is defined as making whole or combining into one⁵⁸ and is symptomatic of the exclusion principle now compelled by forces of global movement to accommodate what, at best, has all along been tolerated. Notwithstanding this accommodation, it is apparent from the exclusion of the statement of the vital principles underpinning the CRPD that the legislature does not seem to believe in the implementation or application of its own provisions and would rather leave the executive to be saddled with that headache.

The Bill strikes discordant tunes with the National Policy on Education⁵⁹ and the CRPD. The Bill appears to terminate the right to access adequate education without discrimination with educational assistive devices to children with disabilities at the secondary school level⁶⁰ whereas the CRPD mandates that States Parties shall ensure that persons with disabilities are able to access general tertiary education and enjoins States Parties to ensure that *reasonable accommodation* is provided to persons with disabilities.⁶¹ The CRPD states:

"reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.⁶²

The question is: if the right to education is linked to the right to life, a first generation right which is viewed as inalienable and cannot be forfeited, does the life of the beneficiary children with

57 Section 41(2) 1999 Constitution

58 Black's Law Dictionary 9th Edition page 880

59 2013

60 Section 22(2)

61 Article 24(5)

62 Article 2

disabilities terminate after secondary education? It seems obvious that the Nigerian State is unwilling at any level to bear any burden at all in ensuring access to equal and adequate education for children with disabilities at the tertiary level without even considering whether it is proportionate in any individual case.

The Policy stipulates a teacher/pupil ratio of 1:10 in special schools⁶³ in diametric opposite to the provision of the Bill which stipulates "at least a trained personnel to cater for the educational development of persons with disabilities"⁶⁴ in every school. It is submitted that the objective of the CRPD is to ensure that all teachers, including those with disability, professionals and staff in every school shall have sufficient training in sign language and/or Braille, and be ready and willing to work at all levels of education including disability awareness. It is in this way that children with disabilities can attain the support required for their individual special needs. The provision of one personnel, meaning one teacher, for every school is therefore grossly inadequate to validate the right to equal and adequate education for children with disabilities. The social benefit or charity approach of this Bill is also discriminatory and unacceptable as it does not respect the principles of inclusion, equal access, appropriateness, individualised education needs, required support, etc. enshrined in the CRPD. Effort should be made by the legislature to, as much as possible, marry the Bill with the provisions of the CRPD within the reasonable accommodation doctrine and the capacity of the nation to envision a global development index.

Implementation and Enforcement Mechanisms

The effectiveness of any existing law lies in its applicability, implementation and enforcement mechanisms. As such, adequate measures should be provided to enforce these laws through the appropriate legal and non-legal mechanisms. Another important point is to ensure the ratification and domestication of all

⁶³ 2013, Paragraph 123(c), Chapter 7, Page 56

⁶⁴ Section 23(1)a

international conventions or laws to which Nigeria is a signatory, so as to make them justiciable in the local courts of the land.⁶⁵ Consequently, corruption among government functionaries and public officials is another factor that hinders equitable distribution of social and economic dividends to poverty-stricken Nigerians, while this undesirable monster tends to frustrate every effort put in place to permanently support the effective implementation and enforcement of social rights and other human rights laws (e.g. the Bureau for Code of Conduct, the EFCC and the ICPC). These are coupled with the weak institutional foundations, corrupt insensitive judicial system, where cases brought before the courts are not only delayed in definitely by intermittent court procedures in the form of *injunctions*, *ex parte motions* and *unwarranted adjournments*, but also by creating possible loopholes for miscarriage of justice. Thus, cases are inadvertently allowed to drag on for many years unabated.⁶⁶ In its report to the UNESCO, the National Human Rights Commission stated:

"Nigeria has ratified the United Nation's Convention on the Rights of Persons with Disabilities, but has neither domesticated it nor put in place national structure for the implementation of its provisions. Persons With disabilities still have below average access to education"⁶⁷

Although it is claimed by the Education for All Review Report (EFA) for Nigeria⁶⁸ that "the UBE Programme is an expression of

65 TU Onyemaechi: *African Research Review* Vol. 4(3a) July, 2010. Pp. 378-398 Copyright © IAARR, 2009: www.afrrevjo.com 394, *Indexed African Journals Online: www.ajol.info* accessed at 10.05 p.m. on Monday 04/09/2017

66 *Ibid*

67 Independent Report, Page

68 Nigeria EFA Review Report 2000 - 2014 accessed at unesdoc.unesco.org/images/0023/002310/2310c10e.pdf

the desire of the government of Nigeria to fight poverty and reinforce participatory democracy by raising the level of awareness and general education of the entire citizenry"⁶⁹, it would appear that children with disabilities are not in the consciousness of government in this desire. There is no evidence that their right to access equal and adequate education stipulated in the laws and policy of Nigeria on education have received any attention by the implementing authorities. In the face of contending rights to government funding, education has failed to meet the United Nations recommendation of 26% of annual budget of nations with the 2017 budget attaining an all time high of 6%! For the year, the total budget of the States of the Federation for education stood at N653.53billion representing only 10.7% of the combined annual budget of N6.1trillion.⁷⁰ It can be seen from the Scope of the Universal Basic Education Program⁷¹ that there is no mention of or provision for special needs education which is often bumped for "other priority sectors". This is because although the scope includes "special programmes of encouragement" to all marginalised groups including girls and women, nomadic populations, out-of-school youth and almajiris, it made no mention of any special encouragement for children with disabilities. The Education For All (EFA) Report also did not make any mention of any such "special programmes of encouragement" and totally omitted to discuss the "disabled group". It is submitted that the omission of "disabled groups" from the EFA Report is not only a violation of Section 15 of the UBE Act but a manifestation of the non-implementation of government policy on the right of education for children with disabilities.

Notwithstanding the inadequacies of the 2017 Budget, it far surpasses the provisions of the 2014 Appropriation Act which shows that there was no provision for disability education even though

⁶⁹ 2015 Education for All Review Report, Page 5

⁷⁰ Premium Times, December 16, 2016 available at www.premiumtimesng.com/news/top-news/218097-2017-nigeria-fails-meet-un-benchmark-education@12.50a.m.

⁷¹ *Ibid* page 6

nomadic education was specifically listed and received a budget allocation of N728million while Mass Literacy and UBE received N1.04billion and N74.41billion respectively. Even if it is argued that the budgetary allocation for disabled groups is lumped with UBE, it is submitted that the funds which have remained in government coffers have not reached the States where they are required because most states have failed to satisfy the precautionary clause preventing the misuse or misapplication of the funds⁷². The 2% intervening fund allocated to Special Need Education did not demonstrate any activity to which the fund was applied.⁷³ Nowhere in the 178page document was the right to education of children with disabilities accorded any attention or mention. An omission of disabled groups especially children from the implementation goals of UBE, EFA and MDGs is not only a violation of their right but an invitation to anarchy arising from planning with inadequate data which will escalate poverty and retard national development.

Access To Equal And Adequate Education Is A Right To Social Justice

International best practices dictate that access to equal and adequate education for children with disabilities is a right to social justice and not a social welfare benefit. In this sense, education is tailored to meet the specific demands of each child on the basis of appropriateness to her personal needs and development and the nature of disability on the principle of the best interest of the child. The goal must be to enable children living with disabilities to be equipped with knowledge and capacity to live independently and contribute their quota to national development.

In one school observed in Lagos, one of the few States engaged in awareness for disability issues and providing some level of education in public primary schools, over 40 pupils with different disability profiles were lumped into one classroom superintended by two overwhelmed teachers. There were in attendance in the same

72 *Ibid* Page 9

73 *Ibid* page 8

class pupils aged 8years – 10years with physical disability, cerebral palsy and autism and also others between 15years - 20years who have down syndrome, cerebral palsy, etc. It is certain that no meaningful academic activity could progress in this environment which will be appropriate to each child's special need as education, to be meaningful, must be age-appropriate.

Complaints of inadequate facilities, insufficient or lack of education materials, lack of personnel and absence of training and re-training remain a huge challenge and a violation of the right to equal and adequate education. Pupils and students are left without the education and therapies which they are entitled to under existing laws and government does not provide an alternative remedy while pretending to meet its legal obligation on media waves. In actual fact, the legally-mandated duties of government have been transferred to parents who are overwhelmed and over-burdened.

In handling this challenge, the United States of America enacted a law which recognises the imperative for access to appropriate equal, adequate and inclusive education for children with disabilities.⁷⁴ The Individuals with Disabilities Education Act (IDEA) is characterised as ensuring services to children with disabilities and governs how States and public agencies provide early intervention, special education and related services to toddlers with disabilities between 0 – 2years and children and youth with disabilities and make children and youth between 3 – 21years receive special education and related services under the Act.⁷⁵ Under the Act, States and local agencies are given substantial funding for the education of handicapped (disabled) children on the condition that the States comply with extensive goals and procedures. In furtherance of IDEA, the Office of Special Education and Rehabilitation Services (OSERS) in the U.S. Department of Education developed the Individualised Education Programme (IEP) which is described as a "Written Statement for each Child with

⁷⁴ Individuals with Disabilities Education Act (IDEA) Act 2004

⁷⁵ The Act was signed into law by President G.W. Bush on December 3, 2004 and became effective on July 1, 2005.

disability that is developed, reviewed and revised in a meeting."⁷⁶
The IEP among other things includes:

- a. A statement of the child's present levels of academic achievement and functional performance
- b. A statement of measurable annual goals, including academic and functional goals designed to meet the child's needs but result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and meet each of the child's other educational needs that result from the child's disability; and
- c. A statement of the special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable to be provided to the child or on behalf of the child.⁷⁷

It is submitted that IDEA which is a law situates the right to education for children with disabilities in the arena of social justice and has been the subject of judicial pronouncement in the past few years.⁷⁸ It is a law in progress of implementation and confronting initial hiccups which are being subjected to the test of judicial interpretation. But overall, it represents a force in the annals of social justice reform. In the most recent case of *Endrew F v. Douglas County School District*⁷⁹, the U.S. Supreme Court considered the provision of IDEA which required States to make available a "free appropriate public education" (FAPE) to eligible children with disabilities and held:

"To meet its substantive obligation under the Individuals with Disabilities Education Act, a

76 Part 300 Individualised Education Programme available at idea.ed.gov/explore/view/p/root,dynamicTopicalBrief,10html accessed on Saturday August 26, 2017.

77 *Ibid*

78 *Honing v. Doe* 484 U.S.305,311 (1988);

79 Judgment delivered on March 22, 2017 available at [www.scorusblog.com/cases-files/cases/endrew-f v douglas-county-school-district/](http://www.scorusblog.com/cases-files/cases/endrew-f-v-douglas-county-school-district/) accessed on 8/9/2017 at 6.45p.m.

school must offer an "individualised education program" reasonably calculated to enable a child to make progress appropriate in the light of the child's circumstances".⁸⁰

The background to the *Endrew Case* is that Endrew's parents were concerned with reports that he stood on tables in the classroom, made gestures and threw tantrums and overall did not seem to make much progress in his education. On moving to grade five, the IEP produced by the School remained the same and the parents objected that it had not produced any significant result, was monotonous and used the same goals and objectives each year. His parents pulled him out of public school and placed him in a private school and then demanded reimbursement for the private school tuition. His parents sued the County for failure to provide him with FAPE when it refused to reimburse the tuition. The Douglas District School County argued that what the IEP demanded was some form of benefit of education and this was upheld by both the federal district court and court of appeal. The Supreme Court overruled both courts and held that the IEP means an educational programme designed to allow the child to progress from grade to grade and even if that is not possible, schools must provide a programme that is "appropriately ambitious in the light of the child's circumstances". Chief Justice Roberts stressed that although the goals may differ, every child has the chance to meet the challenging objectives.

The revolutionary decision in *Endrew F. v. Douglas County School District (Supra)* is considered a big step forward by advocates for children with disabilities and strengthens the decision in *Board Of Education, Hendrick Hudson Central School District v. Rowley*⁸¹ where the U.S. Supreme Court, per Rehnquist J, found that free and appropriate public education imposes on States a duty

80 Per Chief Justice Roberts

81 458 U.S. 176 (1982) available at <https://supreme.justia.com/cases/federal/us/458/176/case.html> accessed on 8/9/2017 at 6.58p.m

to ensure that children with disabilities have access to an education that is meaningful which must be understood to require states to provide each child with disabilities with an opportunity to make significant educational progress. The Supreme Court said:

*"The Act's requirement of a 'free appropriate public education' is satisfied when the state provides personalised instruction with sufficient support services to permit the handicapped child to benefit educationally from that support. Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate grade levels used in the state's regular education, and must comport with the child's IEP as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.."*⁸²

Even though the U.S. Supreme Court did not grant the relief seeking a stringent standard that would require public schools to give children with disabilities an opportunity to "achieve academic success" and attain "self-sufficiency" in *Endrew's Case*, it nevertheless established that to aim as low as merely more than the "minimistest" applied by the Appeal Court would be tantamount to sitting idly awaiting the time when they were old enough to drop out of IDEA's coverage.

It is submitted that this decision is a signpost of social justice as opposed to social welfare as it considers free appropriate public education a matter of beneficial right stipulated by law to guarantee

82 Education of the Handicapped Act (EHA) 84 Stat. 175 (as amended) 20 U.S.C §1401 et seq. (1976 ed. Supp. IV) was replaced by the Individual Development Education Act 2004.

83 Page 187 - 204

equal and adequate compulsory education for children with disabilities. The admission of the Federal Government of Nigeria that “publicly-owned institutions *are yet to dispense ECCDE*⁸⁴ for children with special needs” and “poor commitment on the part of the States to access UBEC intervention fund”⁸⁵ is not only an indication that there is an implementation deficit but expressly amounts to the denial and flagrant violation of the right to education of children with disabilities.

The responsibility to ensure conformity to the law on education for children with disabilities is that of the Federal Government whose policy stipulates that it *shall* contribute to the funding of special education programmes across the country; be responsible for policy formulation and modification relating to the special education programmes; coordinate and supervise the provision of special education services and programmes for persons with special needs; and provide matching grants to states and local governments for the provision of special education programmes.⁸⁶ The failure of government to accomplish this set policy has led to monumental injustice as a majority of the children with disabilities in Nigeria have no access to compulsory universal basic education and are thereby excluded from the enjoyment of a fundamental and statutory right.

The Justiciability of The Right of Access to Free And Adequate Education By Children With Disabilities

Section 6(6)(c) of the 1999 Constitution as amended has been flaunted over the years as the non-justiciability clause in the Constitution that ousts the jurisdiction of the Courts in Nigeria regarding matters contained in Chapter II thereof which includes, Section 18 dealing with the fundamental objective and directive principle of the Nigerian State to provide equal and adequate

84 Early Childhood Care and Development Education

85 *Education for All 2015 National Review Report: Nigeria* available at efu2015reviews@unesco.org accessed on 27/08/2017 at

86 National Policy on Education 2013, 6th Edition, Page 54, Paragraph 120

education at all levels to all Nigerian citizens. It is appropriate to state right away that the provision of equal and adequate education to all citizens is irrespective of the circumstances of their birth and status thereafter. As at today, similar principles in many jurisdictions have become justiciable rights and are prominently listed in international law and norms.⁸⁷ Significantly, the Constitution enjoins the State and its agencies vested with legislative, executive and judicial powers to ensure conformity and application of the directive principles.⁸⁸ In *Minerva Mills Ltd. & Ors v. Union of India & Ors* the Supreme Court of India, while considering a similar chapter of the Indian Constitution *in parimateria* with Chapter II of the Nigerian Constitution, held that these principles have become so fundamental in the governance of a country such that there is no sphere of public life where delay can defeat justice with more telling effect than in the non-implementation of the Directive Principles.⁸⁹ Section 13 of the 1999 Constitution states:

"It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive and judicial powers, to conform to, observe and apply the provisions of this Chapter of the Constitution."

It is submitted that a community reading of the above provision and Item 60 of the Exclusive Legislative List (E.L.L) of the Constitution⁹⁰ makes it reasonable to argue that save for the draconian laws of the Military Government by which it ousts legal principles unsuitable to its penchant, the original intention of the drafters of the Constitution must be that these principles shall be made justiciable rights. Nevertheless, even if it is admitted that the Chapter is non-justiciable, it has been held that any of the principles

87 International Covenant on Economic, Social and Cultural Rights

88 Section 13

89 Cited by Femi Aborishade's Blog @ femiaborishade.blogspot.com.ng/2013/05/the-imperatives-of-justiciability-of-1.html accessed on August 27, 2017 at 12.20a.m.

90 2nd Schedule Part I

of the Chapter is justiciable upon the enactment of a law of the National Assembly on any of the objectives.⁹¹ *In Re Olafisoye*, the Supreme Court adopted the reasoning of Professor O. Obilade in his paper "The Corrupt Practices and other Related Offences and the Right to Privacy, thus:

*"It is clear, therefore that although Section 15(5) of the Constitution is, in general, not justiciable, as soon as the National Assembly exercises its power under Section 4 of the Constitution with respect to Item 60(a) of the Exclusive Legislative List, the provisions of Section 15(5) of the Constitution becomes justiciable. See Contemporary Issues in the Administration of Justice: Essays in Honour of Justice AtinukeIge, Page 127"*⁹²

Accordingly, it is submitted that by the enactment of the Child Rights Act⁹³ (CRA) and the Compulsory, Free Universal Basic Education Act⁹⁴ (UBEC Act), both of which guarantee the right of every child to compulsory, free universal basic education,⁹⁵ Section 18 of the 1999 Constitution has automatically become justiciable. Better still, it is submitted that the enactment of the African Charter on Human and People's Rights (Ratification and Enforcement) Act⁹⁶ clearly makes the right to education a justiciable right as Section 1 of that Act mandated that its provisions shall have the "force of law

91 *In Re Olafisoye* (2004) 1 S.C. (Pt II) 27 where the Supreme Court of Nigeria considered the principle in section 15(5) of the Constitution dealing with the abolition of corrupt practices and abuse of power.

92 *Ibid* page 76. The Supreme Court has previously held in *OKOJIE & ORS. v. GOV. OF LAGOS STATE* (1981) 1 NCLR 218 and *Adewole v. Jakande & Ors.* (1981) 1 NCLR 262 that Section 18 of the 1979 Constitution *in parimateria* with Section 18 of the 1999 Constitution was justiciable and linked to the fundamental right to freedom of expression

93 2003,

94 2004

95 Section 15 of 2003; Section 2 of 2004.

96 1983, Cap. A9 Law of the Federation of Nigeria 2004

in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria⁹⁷

It is submitted, therefore, on the strength of the foregoing that every individual, or every person or every child as used in the laws include children with disabilities who have concurrent right with every other citizen to equal and adequate education. That apart, it is submitted that by the current trend in international law and best practices, the right to education has been linked to the right to life. Happily, this has been captured in the goals and philosophy of education in Nigeria contained in the National Policy on Education⁹⁸ made pursuant to the UBEC Act⁹⁹. It has been held that the right to life includes the protection of every limb or faculty through which life is enjoyed.¹⁰⁰

In *SERAP v. Federal Republic of Nigeria & Anor*¹⁰¹ the ECOWAS Court considered the Plaintiff's allegation of the violation of the right to quality education guaranteed by Article 17 of the African Charter on Human and Peoples' Right. The Federal Government argued that the UBEC Act and the Child Rights Act are municipal laws of Nigeria and therefore not a treaty, convention or protocol of ECOWAS to vest jurisdiction on the Court; that the educational objective of the Federal Republic of Nigeria is provided for under Section 18(1), (2) and (3) of Chapter II of the 1999 Constitution and is non-justiciable and unenforceable and cannot be determined by the Court; and that the Plaintiff had no *locus standi* because the Plaintiff had not suffered any damage, loss or personal injury. The Court held that it had jurisdiction to hear the Plaintiff's case pursuant to Article 9(4) of the Supplementary Protocol which

97 Section 1

98 2013 6th ed. NERDC Printing Press

99 *Ibid* pages 1-3

100 *CORALIE V UNION TERRITORY OF INDIA* (1981) A.I.R 746; (1981) S.C.R.(2) 516 available at <https://indiankanoon.org/doc/178536> accessed on 27/08/2017 at 9.56p.m.

101 *ECW/CCJ/APP08/08* available at r2c.gn.apc.org/node/717 accessed on 27/08/2017 at 10.18p.m.

empowers the Court to adjudicate the violation of rights of citizens that occur in member states; and that the existence of the right to education in the UBEC Act and Child Rights Act did not automatically oust their enforcement by the ECOWAS Court; and that the re-enactment of the African Charter and signing of the Revised Treaty of ECOWAS signifies Nigeria's determination to promote, recognise and protect the Charter and the Treaty and to be bound by their provisions.

Conclusion

It has been sufficiently demonstrated that although Nigeria is yet to enact the Convention on the Rights of Persons with Disabilities by an act of the National Assembly, there is in existence sufficient legal framework that will enable the country enforce and implement the right of children with disabilities to equal and adequate education. There appears however to be sludge in the execution and enforcement process. Accordingly, both the executive and judicial arms should be strenuously engaged to implement and enforce this right. Even though a separate Commission is desirable to handle disability matters, the Universal Basic Education Commission has sufficient mandate to implement the right to education for children with disabilities which has been captured to a reasonable extent in the National Policy on Education. Budgetary allocations should be disbursed to States and local governments as counterpart funding which will activate the coordination and supervisory roles of the Federal Government. Lawyers, civil organisations, human rights organisations, the Nigerian Bar Association, parents and all stakeholders should refuse to be cowed by stigmatization and engage the judiciary to ensure that this social justice right does not elude this special group. Although the judiciary must interpret our laws in accordance with our statutes, where the provisions are overly restrictive, it must be sufficiently courageous to adopt international best practices as an indication of Nigeria's commitment to universal principles and international conventions and norms adopted by the country.

THE ROBBERY AND FIREARMS ACT AND THE LEGALITY OF ITS DEATH PENALTY IN NIGERIA

By

S.O. Daudu*

Abstract

An X-ray of the Robbery and Firearms Act is to diagnose and determine its efficacies on the imposition of death penalty on an accused person who have been found guilty of a capital offence, of armed robbery. This examination is to further determine an appropriate therapy where the law has been found wanting. The Act expressly recognized and endorsed the death sentence as a punishment for a capital offence. The rationale is that any constitutional objection to the death penalty is effectively rebutted by the provisions of section 33(1) of the 1999 Constitution (as amended). This article however argued that there exist a plethora of cases, where the courts have demonstrated the constitutional recognition of capital punishment as enshrined in the Robbery and Firearms Act. Consequently, it will be contended that our Constitution recognizes the death sentence as a punishment for a capital offence. The article concluded that the sentence of death in itself cannot be degrading and inhuman as envisaged by the salient provisions of section 33(1) of the Constitution. Noting that the Constitution is not intended to approbate and reprobate.

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Robbery

The offence of robbery is governed by the provision of sections 401, and 402 of the Criminal Code. Section 401 provides that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is said to be guilty of robbery. According to Jefferson¹, the offence of robbery may be seen as a crime against both property and the person. By section 8(1)(a) of the Theft Act², a person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses any force on any person or puts or seeks to put any person in fear of being then and there subjected to force. Robbery is essentially, an aggravated form of theft. All elements of theft must be proved before a conviction shall be secured for the offence. An accused is therefore, not guilty of robbery, if he believes that he has a legal right to deprive the victim of the property. In *R v. Robinson*³, the accused person demanded that the victims repay a debt owed by the victim's wife to him. He had a knife to reinforce his demand. The court held that the facts did not constitute robbery because the accused was not dishonest, because he thought he had a legal right to the money. However, in *R v. Forrester*⁴ the accused had no claim of right, he was dishonest. All the elements of theft were present. He used force by knocking off balance his victim, who was also kept under restraint, and the force was used immediately before stealing.

To Okonkwo and Naish⁵, the offence may be committed by a fraudulent conversion provided that the element of violence is

1 Jefferson M. *Criminal Law* 7th ed (England; Pearson education Ltd 2006) 621

2 The English Theft Act of 1968

3 (1977) Crim. L.R. 173

4 (1992) Crim L.R. 793

5 Okonkwo C.O. & Naish, *Criminal Law in Nigeria* 2nd ed (Ibadan; Spectrum Books Ltd, 1980) 303

present. In *R v. Bekum*⁶, where A and his companions deposited valuable property in B's house and then went out to buy some meat and were attacked and killed on the way by B who intended to, and did in fact steal the property, it was held to be a robbery. But in *Njuguna v. Republic*⁷, the accused having burgled a house and stolen therefore was discovered without chase at a distance of about five hundred yards away where he then resisted the owner with violence. It was held that the offence was not robbery but burglary and theft because the element of using violence immediately after the act was lacking.

Meanwhile section 402 of the Criminal Code provides for the punishment of robbery. Section 402(1) provides thus:

Any person who commits the offence of robbery shall upon conviction be sentenced to imprisonment for not less than twenty - one years.

2. If-

- (a) Any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or any obnoxious chemical materials or is in company with any person so armed; or
- (b) At or immediately before or immediately after the time of robbery, the said offender wounds any person; the offender shall upon conviction be sentence to death.

Armed Robbery

The foundation of the offence of armed robbery is the existence of a clear act that amounts to stealing, that is to convert to one's use or the use of any other person anything other than immovable property with any of the following intent.⁸

- (a) An intent permanently to deprive the owner of the thing of it.

6 (1941) 7 WACA 45

7 (1965) E.A. 583

8 See *Tanko v. State* (2009) 4 NWLR (Pt 1113) 430 at 439

- (b) An intent permanently to deprive any person who has a special property in the thing of such property;
- (c) An intent to use one thing as a pledge or security
- (d) An intent to part with the thing in a condition as to its return which the person taking or converting it may be unable to perform;
- (e) An intent to deal with the thing in such a manner that it can not be returned in the condition in which it was at the time of taking or conversion; or
- (f) In the case of money, an intent to use it at the will of the person who takes or converts it.

In effect, armed robbery means simply stealing plus violence used or threatened.⁹ In *Balogun v. Attorney - General, Ogun State*,¹⁰ the court held that by virtue of section 15(1) of the Robbery and Firearms (Special Provisions) Act, robbery means stealing anything and, at or immediately before or after the time of stealing it, using or threatening to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained. Interestingly, armed robbery was made a capital offence by the military regime in 1970¹¹. While this is emblematic of the regime's preference for the death penalty for serious offences¹², robbery with violence was a

9 *Aruna v. The State* (1990) 6 NWLR (Pt 155) 125

10 (2001) 14 NWLR (pt. 7333) 331 (CA)

11 Ukhuegbe, S. "The Death Penalty in the Supreme Court of Nigeria: A Critical Evaluation of Huri Laws" Constitutional Challenges of the Nineties" (Faculty of Law Seminar Lecture Series 2011) 13

12 The Inventory of Capital offences under military rule included economic and anti-social crimes/ namely, kidnapping, murder, unauthorized possession or use of firearms, explosive or other offensive weapon during the civil war, disruption of the production and distribution of petroleum products, armed robbery, arson tampering with oil pipelines and counterfeiting of currency. For some of these offences an attempt carries the same penalty as the complete offence.

serious menace at the end of the Nigerian Civil War (1967-70), and remains a matter of grave social concern. There has naturally been consistently strong public support for the punishment. Recently, demand for ransom from kidnapping, is a fast -growing menace, which has been made a capital offence in some States. Furthermore, the death penalty is recognized in our statute books,¹³ execution is by hanging and during the military regimes, execution by firing squad was used for treason and armed robbery.¹⁴

In a similar vein, the court held in *Bolante v. The State*,¹⁵ that any person who commits the offence of robbery with a firearm or any offensive weapon or is in company of any person so armed is liable upon conviction to death sentence. In the instance case, the court further held that the evidence of the case of armed robbery against the appellants was over-whelming and that all the ingredients of the offence, were proved against him. In this case, the appellant and others were said to have robbed one Emmanuel Fatundimu and his neighbours, when armed with such dangerous weapons as broken bottles, gun, and matchet and iron rods. At the end of the rade, the robbers took away some money and other valuables belonging to the victims. One of the women was sexually assaulted and the mother of PW4 died from wounds sustained during the robbery incident. The appellant was accordingly found guilty and sentenced to death.

13 Smith, D.Z. "The Death Penalty in Africa" (2004) 4 *Africa Human Rights*, L.J. 1 (Review of Death Penalty in Africa) for Nigeria. See ILO, U.J. The Rope: Country report on Death Penalty Application in Nigeria (Lagos, Hurlaws, 2004) report presented at the first African conference on Death penalty Application in Commonwealth Africa May 2004. See also Amnesty International Nigeria. The Penal Systems.

14 See section 1(3) of the Robbery and Firearms Act.

15 (2005) 7 NWLR (pt. 925) 431. see the case of *Bello v. State*. (2007) 10 NWLR (pt 1043) where the court held that failure to prove the fundamental ingredients for the offence of armed robbery is fatal to the prosecution case.

In *Gabriel v. The State*¹⁶, the appellant and four others were arraigned for robbing one Sunday Omomejoh of the sum of N3000, 000 (Three Hundred Thousand Naira) while armed with offensive weapons, to wit, guns. The court held that, the offence of armed robbery is a grave one and attracts death sentence if the person accused of committing the offence is found guilty. It should be stressed that by a proper construction of the provisions of section 1(3) of the Robbery and Firearms (Special Provisions) Act¹⁷, it is the Governor that has the power to prescribe the mode of carrying out the death sentence. In *Ikemv. the State*¹⁸, the court held that the duty of directing the mode of execution of a death sentence does not lie with the trial court but with the Governor of the state. This would have informed the decision in *Tanko v. State* where the court held that the trial court's pronouncement that the appellant be hanged, though improper, did not vitiate the whole proceedings nor did it occasion miscarriage of justice.

In *Alor v. State*,¹⁹ the appellant was charged with the offence of armed robbery, contrary to Section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act, 1970. The allegation against the appellant was that he, on the 13th June, 1981, at Akama Amankwo Ngwo in Enugu Judicial Division, in company of other persons armed with a firearm, to wit, a locally made pistol, robbed one Theresa Okwor of the sum of N130.00 in cash and wearing apparels valued at N700.00. What could reasonably be inferred from the evidence of the two witnesses mentioned above, was that the place in which one of them was living, was separate and distinct from the place where the other was living. The allegation was that on the day in question, two armed robbery offences, were committed and that the appellant was one of the alleged armed robbers who took part in the two separate armed robbery incidents.

16 (2010) 6 NWLR Pt (1190) 291

17 Cap R 11 Laws of the Federation of Nigeria 2004

18 (1985) 1 NWLR (pt 2) 378

19 (1998) 1 LRCNCC, 125

P.W. 1 was living in the house in which one of the armed robbery offences was committed and P.W. 2 was living in the house in which the second armed robbery offence was committed. In order to appreciate the extent and the effect of the confusion, which eventually arose, it is necessary to give a brief summary of the evidence of the P.W. 1 and the P.W.2. The P.W.1 told the learned trial Judge that on the day on question (13/6/81), three persons invaded their house. The appellant was one of them. One of the three aforesaid persons had a gun. They took his mother's matchet from under her bed and took the sum of N60.00 from her by force. With the aid of torchlight, P.W.1 recognized the appellant who counted the money taken from his mother. One of the alleged armed robbers hit the witness with a matchet and later they went to the premises of P.W.2. The evidence of the P.W.2 was that while she was sleeping with her children in a room in her house, some strange person outside the house ordered her to open the door and threatened to kill her, and her children if they refused to open the door. As a result, she opened the door. Torchlight and a gun were pointed at her. One of them struck her with a mortar three times and she feels down. Before she became unconscious, they forced open her wardrobe and the wardrobe of her husband who was away on night duty. They stole N250.00 from her husband's wardrobe and some clothes from her own wardrobe. One of them pointed a torchlight to the one who was wrapping the clothes of the witness on himself, and so the witness was able to identify the appellant who was the one who carried the clothes of the witness away, not long after the incident, she saw some of her clothes taken away and being sold in the open market. Based on the evidence before the trial court, appellant was convicted and sentenced. Dissatisfied with the conviction, appellant appealed to the Supreme Court which held that: the punishment on conviction for robbery with firearms, that is, armed robbery, is sentence of death. It is immaterial whether the offender is found guilty as a principal offender or as a participant or as an aider or a better or a person who has counseled or procured the commission of the offence or a conspirator who has committed

the offence. And if the accused was among the robbery gang that committed the offence, it does not matter that he himself was not armed²⁰.

In *John Nwachukwu v. The State*,²¹ the appellant was convicted of armed robbery contrary to section 1(2) (a) of the Robbery and Firearms (Special Provisions) Act 1970 and sentenced to death by hanging or firing squad. The prosecution's case was that on the 19th of October 1975 at night, one Alhaji Mohammed Zil and Mohammed Saleh were returning from the cattle market at Ojo to Amukoko. They alighted from their motorcycle, which they parked at the side of the road and continued, on foot. At a point on the road, the appellant who was accompanied by some other persons brought out a toy-gun and pointed it at Mohammed Saleh, who was holding a bag which contained the sum of N4, 990.00. The appellant there and then demanded from 4th P.W. (Mohammed Saleh) the bag. The appellant snatched the bag at gunpoint. The victims pursued the assailants to a house at No. 82 Cemetery Road Amukoko, and the other persons attracted surrounded the house while the Police was called. The Police searched the house and found the accused lying on top of the bag containing the money under a bed at the house. The bag when opened by the police contained the sum of N4, 900.00 and the toy-gun. At the trial the police gave evidence of how the complaint was made, the details of complaint and how the accused was arrested. The trial Judge convicted the accused for armed robbery and sentenced him to death. On Appeal, Counsel for the appellant contended that the toy-gun used by the appellant is not a 'firearms or offensive weapon within the meaning of the Robbery and Firearms (Special Provisions) Act 1970, and therefore the conviction and sentence for armed robbery was improper. Counsel also contended that the evidence of the Police stating the details of the complaint is hearsay and inadmissible and should not have been

20 See also *Okosun v. A.G. Bendel State* (1985) *ILSC* and *Iyaro v. The State* (1988) *NWLR* (Pt 69) 256

21 (1985) 2 *NWLR* 219

admitted in evidence. It was also contended that the trial judge misdirected himself when he relied on a piece of evidence which was not before him, which was that, P.W 4 said that the accused was identified under an electric light whereas P.W. 4 did not say so. The court held:

1. For an accused to be convicted of robbery under Section 1(1) of the Robbery and Firearms (Special Provisions) Act of 1970, the prosecution must prove robbery as defined in Section 9 of the same Act.
2. For an accused to be convicted of armed robbery under Section 1(2) of the Robbery and Firearms (Special Provisions) Act of 1970, the prosecution must not only prove robbery by the accused but also prove that the accused was armed with 'firearms' or 'offensive weapon' and the weapon employed to commit the robbery must either be a 'firearm' or 'offensive weapon' within the meaning of those words in Section 9 of the same Act.
3. Under Section 401 of the Criminal Code Cap 42 1958 Laws of Nigeria, and Section 1(1) of the Robbery and Firearms Act 1970, robbery is stealing anything and at or immediately before, or immediately after, the stealing, using or threatening actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained.
4. In the instance case, although the accused/appellant threatened violence on the victim at the time of stealing, the offence committed is robbery simpliciter and not armed robbery because the toy-gun he used to threaten the victim is not a 'firearm' or 'offensive weapon' within the meaning of Section 9 of the Robbery and Firearms Act of 1970.
5. In this case, apart from the piece of evidence, which was not before the court that the accused/appellant was identified under an electric light, there is over-whelming evidence that it was the accused/ appellant that committed the robbery.

6. The doctrine of recent possession under Section 148(a) of the Evidence Act applies in this case because the appellant was found lying on the bag containing the money, the subject of the robbery, so soon after the act of robbery and in the circumstances revealed in the evidence the Court could draw the inference that the appellant was in possession of the bag and was one of the robbers.
7. A toy-gun is not normally made or adapted for causing injury to the person and is not capable of being used as an offensive weapon but a plaything for children. Therefore a toy-gun is neither a firearm nor an offensive weapon.

Accordingly Nnaemeka -Agu J.C.A. held:

Under the Act "firearms" is defined to include "canon-gun, Rifle, Carbine, Machine-Gun, Cap-Gun, Elirt-Lock gun, Revolver, Pistol, explosive, or Ammunition or other firearms whether whole or in detached pieces. " Also offensive weapon' is also defined to mean: Any article apart from firearms made or adapted for use for causing injury to the person or intended by the person having it for such use by him, and it includes an Air-Gun, Air- Pistol, Bow and Arrow, Spear, cutlass, matchet, Dagger, Cudgel, or any piece of wood, metal glass or stone capable of being used as an offensive weapon.

In *State v. Okonkwo*,²² the court held that armed robbery is committed where at the time of the commission of the robbery the accused is proved to have been armed with *firearms* or offensive

²² (1998) 1 LRCNCC 37. See also *Nwachukwu v. State* (1985) 3 NWLR (Pt 11) 278 and the case of *Okosun v. A. G Bendel State* (1985) 3 NWLR (Pt 12) 283 at 286

weapons. Any person in company of a person so armed, or aiding and abetting in the commission of the offence is similarly guilty²³.

Consequently, it shall be an offence punishable under this Act for any person to knowingly house, shelter, or give quarters to any person who has committed an offence under section 1(2) of this Act²⁴. The Act imposed a duty on any person, hospital or clinic that admits, treats or administers any drug to any person suspected of having bullet wounds to immediately report the matter to the police.²⁵ Therefore any person who, or hospital or clinic which fails to report as stipulated in subsection (2) of this section shall be guilty of an offence under this Act.²⁶ A person convicted of an offence under subsections (1) and (3) of this section shall be liable:-

- (a) In the case of an individual, to imprisonment for a term not exceeding five years; and
- (b) In the case of a hospital or clinic, to a fine of ten thousand Naira and in addition the hospital or clinic shall be closed down²⁷

Section 7 provides to the effect that all the assets, movable or immovable, including motor vehicles, of any person convicted of an offence under this Act, shall be forfeited to the Government of the state in which the asset or property is situated or found.

The Requirements to Sustain a Conviction for Armed Robbery

In *Musa v. The State*,²⁸ the court held that in order to establish the offence of armed robbery, the Prosecution must prove that there was robbery or series of robbery, that each robbery was an armed robbery, and that the accused persons were those who took part in the armed robbery. In the instant case, there was evidence that there

23 See *Nwachukwu v. The State* (1985) 3 NWLR (Pt 11) 218

24 Section 4(1) of the Robbery and Firearms Act

25 Section 4(2) of the Act

26 Section 4(3) (a) and (b) of the Act

27 See section 4(4) of the Act

28 (2005) 2 F.W.L.R. 343

was armed robbery, there was also evidence that the robbers were armed and that appellants were involved in the robbery. Furthermore, in *Abdullahi v. The State*²⁹, the court held that it is the duty of the prosecution to establish by evidence the following ingredients, beyond reasonable doubt, to wit:

- (a) Theft by the accused person(s).
- (b) The causing of hurt or wrongful restraint on the victim(s) by the accused person(s)
- (c) That the acts complained of were done in the process of committing the theft or in order to commit the theft and/ or carry away the property obtained by the theft.
- (d) That the accused persons did the acts complained of voluntarily, and
- (e) That the accused person(s) was/were armed with dangerous weapons while committing the offence in question.

Consequently, the prosecution in a case of armed robbery must establish and prove certain elements against the accused person in order to obtain a conviction. In *Dobie & ors v. The State*,³⁰ the court held that in a charge of armed robbery, the prosecution must prove beyond reasonable doubt, the following in order to succeed. They are:

- (a) That there was a robbery;
- (b) That the robbery was an armed robbery
- (c) That the accused persons were among those who took part in the armed robbery, to sufficiently established the offence against the appellant. The court further held that the use of an object and the manner it is made use of is what qualifies it to be an offensive weapon. The appellants were subsequently convicted and sentenced to death.

On proof of "armed robbery" the court held in *Bozim v. State*³¹

²⁹ (2008) LRCN Vol. 164, 101

³⁰ (2004) 14 NWLR (Pt 893) 257 (CA)

³¹ (1985) 2 NWLR (Pt. 8) 465

1. That there was a robbery
2. That there was armed robbery
3. That the accused took part in the armed robbery.

Jurisdiction over Offences under the Robbery and Firearms Act

In Nigeria, jurisdiction is the blood that gives life to the survival of an action in a court of law³² and without jurisdiction; the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise. In *S.P.D. Nig. Ltd v. Lalibo*,³³ the court held that the issue of jurisdiction of a court to entertain or try a matter brought before it is terminally fatal to the proceedings conducted therein. This is because jurisdiction is the competence, power and authority that the law vests in a court to entertain, try and determine a matter that is brought before it and any defect in such competence would deprive the court of such authority and power on such matters. In *Tanko v. The State*, the court held that by the provisions of section 2(1) and (2) of the Tribunals (Certain Consequential Amendment) Act No. 62 of 1999, the Federal High Court or the High Court of a State is conferred with the jurisdiction to try the offence of armed robbery. By virtue of section 211 (1) of the 1999 Constitution, not only does a State High Court have the jurisdiction to try cases relating to armed robbery, the officials of the Ministry of Justice of a State are eminently qualified to prosecute the offence of armed robbery in any High Court of a State.

Similarly, in *Emelogu v. The State*,³⁴ the Supreme Court held that the Attorney - General of Imo State armed with the Constitutional power under Section 191 of the 1979 Constitution, had the *locus standi* to institute criminal proceedings under the Robbery and Firearms (Special Provisions) Act No. 47 of 1970 as

32 Atsegbua, L. *Administrative Law* (Benin City; Ambik Press, 2010) 104

33 (2009) 14 NNLR (Pt 1162) 569

34 (1988) 2 NWLR (Pt 78) 524

the offence of armed robbery under the Act was deemed to be a law of the House of Assembly of the State. Consequently, the question of delegation of authority from the Attorney – General of the Federal did not arise.

On what the Supreme Court decided in *Emelogu v.State*³⁵, the Court held *inter alia* as follows:

a. That by virtue of the provisions of section 274(4)(b) of the 1979 Constitution, the Robbery and Firearms (Special Provisions) Act No. 47, 1970, became an existing law of a State and "Robbery" per se a residual matter, while the Acts as amended was deemed to have been made by the State House of Assembly and that in view of this, offences under the Robbery and Firearms (Special Provisions) Act No. 47 of 1970 as amended are not federal but State offences;

b. That by virtue of section 191 of the 1979 Constitution, the power to institute the prosecution of criminal causes is vested in the State Attorney –General and because the Robbery and Firearms (Special Provisions) Act. No. 47 of 1970 operated as a State law in so far as armed robbery is concerned, the State Attorney General for Imo State had the locus standi to institute criminal proceedings thereunder and the question of delegation of authority does not arise.

c. That even though the provisions of section 6 of the Robbery and Firearms (Special Provisions) Act. No. 47 of 1970 has been repealed by the Federal Republic (Certain Consequential Repeals etc) Decree No. 105 of 1979 by virtue of section 239 of the 1979 Constitution the Criminal Procedure (Miscellaneous Provision) Edict, 1974 of the East Central State became an existing law of the Imo State on the 1st of October, 1979. Therefore, the provisions of the Criminal Procedure (Miscellaneous Provisions) Edict, 1974, is

35 Ibid

the applicable law to the trial of offence under the Robber and Firearms (Special Provisions) Act No. 4 of 1970.

On whether High Court of a State has jurisdiction to try offence of armed robbery, *Rhodes-Vivour, J.C.A.* (as he then was), held in *Okafor v. State*.³⁶

"My Lords, the Tribunals (Certain Consequential Amendments Act) Decree No. 62 of 1999 came into force on the 28th of May 1999 with sweeping amendments for the trial of federal offences such as:

- a. Advance fee fraud and other related offences.*
- b. Counterfeit and fake drugs*
- c. Money laundering*
- d. Failed banks recovery of debts etc.*

Amendments were also made to section 8 of the Robbery and Firearms (Special Provisions) Decree.

By the amendments offences under the decree shall be triable in the High Court of the State concerned.

Decree No. 62 of 1999 is an existing law, and that explains the trial of robbery cases in State High Courts.

Accordingly the trial and conviction of the appellant by the Niger State High Court was not a nullity".

In *Eyisi v. The State*,³⁷ it was held that the State High Court has jurisdiction over armed robbery matters by virtue of section 1(2) of the Robbery and firearms (Special Provision) Amendment Act No. 21 of 1984: -Onu, JSC (as he then was) held:

With the coming back of the Military to the rulership of Nigeria at the end of the year 1983, another Decree-Armed Robbery and Firearms (Special Provisions) Decree No. 5 of 1984, was promulgated and tribunals were re-established. By

36 (2006) 4 NWLR (Pt 969) 5

37 (2001) F.W.L.R. 763

section 1(2) of the Robbery and Firearms (Special Provision) Amendment Decree No. 21 of 1984, part-heard matters were allowed to continue and be concluded in the High Courts, while new matters were transferred to the tribunals – see: Emelogu vs. The State (supra).

From the records, trial in the present appeal started at the High Court on 10th November 1983, and this was part heard at the time when Decree No. 5 of the 1984 came into force. Therefore, the High Court under section 1(2) of the Amended Decree No. 21 of 1984 had to continue with the trial of the case. In the same case, Ogundare, JSC (as he then was), said:

Section 5 of the Act, which prescribed the place of trial of offences under the Act, was amended by replacing the tribunal set up under the original section 5 with “the High Court of the State concerned”. The 1979 Constitution came into force on 1st October 1979. From that date, the High Court of a State became seized of offences under the Robbery and Firearms (Special Provisions) Act, 1970. it follows, sitting at Onitsha became seized of the matter on hand by the arraignment of the appellants on 10th November 1983, it had jurisdiction to try them. According to the record before us, the trial of the appellants did not end in that court until 29th May 1987. The case was, thus, part heard on 31st December 1983 when the constitutional governance of the country was overthrown by the armed forces and military dictatorship was once again introduced. The regime in 1984 promulgated the Robbery and Firearms (Special Provisions) Decree No. 5 of 1984, which repealed the 1970 Act and part of Schedule 3 of Decree No. 105 of 1979

amending the 1970 Act. It reverted to trial of robbery and firearms offences by tribunals. This Decree was soon amended by the Robbery and Firearms (Special Provisions) Amendment Decree No. 21 of 1984 sub section (4) of section 1 of which provided: 'Any part - heard proceedings before any High Court on the date of the Coming into force of this Decree shall be continued and completed as if the provisions of this Decree had not been made; This saving clause preserved the trial in the State High Court of offences under the 1970 Act, where the proceedings had commenced and were part-heard on 29th March 1984, the date Decree No. 5 of 1984 came into force. The trial of the appellants by the High Court of Anambra State was one of such proceedings saved by Decree No. 21 of 1984. I, therefore, hold that the trial High Court had jurisdiction to try the appellants.

The Legality of Death Penalty under the Robbery and Firearms Act

By the tenor of section 1(1), (2) and (3) of the Robbery and Firearms Act³⁸ a person shall upon conviction for an offence under the act be liable to the sentence of death.

Section 1(1) provides:

- (1) Any person who commits the offence of robbery shall upon trial and conviction under this Act, be sentenced to imprisonment for not less than 21 years.
- (2) If -
 - (a) Any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or is in company with any person so armed, or

(b) At or immediately before or immediately after the time of the robbery the said offenders wounds or uses any personal violence to any person, the offender shall be liable upon conviction under this Act to be sentenced to death.

(3) The sentence of death imposed under this section may be executed by hanging the offender by the neck till he be dead or by causing such offender to suffer death by firing squad as the Governor may direct.

In the case of *Gabriel v. State*³⁹ the Supreme Court held that:

*A death sentence is an exception to the general rule that no man should be deprived of life. Also, a death sentence does not amount to degrading and inhuman treatment, and therefore not inconsistent with the 1999 Constitution*⁴⁰.

Similarly in the case of *Kalu v. State*⁴¹ the Supreme Court held that the death penalty is not unconstitutional in view of the provisions of section (30) of the 1979 constitution, which provides for the right life in qualified and derogable terms.

In *Rabiu v. State*⁴² the Supreme Court held that foreign judicial decisions on issue relating to legality of death penalty may be persuasive but they are not applicable in Nigeria. Death sentence is a reality in Nigeria. It is provided for in Nigerian Criminal laws

39 (2010) 6 NWLR (Pt 1190) 280. See also *Kalu v. State* (1998) 13 NWLR (Pt 583) 531

40 In *Kalu v. State* supra, the Supreme Court held unanimously that the death penalty is not unconstitutional in view of the provisions of section 30 of the 1979 constitution, which provides for the right to life in qualified and derogable terms. It further held that section 319(1) of the criminal code is not inconsistent with section 31 of the same constitution.

41 (1998) 13 NWLR (Pt 583) 531

42 (1981) 2 NCLR 293

including section 319(1) of the Criminal Code. The Constitution cannot approbate and reprobate.⁴³

On whether the court has power to commute death penalty stipulated under the Robbery and Firearms (Special Provisions) Act to a term of Imprisonment Denton – West, J.C.A. in *Abacha v. Fawehinmi* said:

On the point that this court should commute the sentence of death to imprisonment not exceeding 10 years. This court is a court of law and it is being guided by the Constitution. This court does not have such powers and rather would exhort that such issue should be taken by way of commencing action vide Fundamental Right (Enforcement) Procedure in the State High Court or Federal High Court. Abacha v. Fawehinmi (2000) All NLR 35; (2000) 6 NWLR (pt 660) 228. further, it is the legislature that could affect this change without much ado.⁴⁴

Conclusion

Although, it may not be apposite to conclude that an X- ray of the Robbery and Firearms Act has revealed all the ailments in the Act for proper diagnosis, it is good to say that a proper platform has been provided for a therapy. From the provisions of section 1 (1), (2) and (3) of the robbery and firearms Act, death penalty is recognized as a punishment for any offence committed under the Act. The provision on death penalty in Section (1) of the Robbery and Firearms Act is not offensive to the provision of Section 33(1) of the 1999 Constitution (as amended). Consequently, the life a person taken in compliance with the provision of the Robbery and Firearms Act is legal, at least so says the Act. It is however recommended in this article that caution should be applied in the

43 See *Rabiu v. State* (1981) 2 NCLR 293

44 *Abacha v. Fawehinmi* (2000) All NLR 35;

application of the provisions of the Robbery and Firearms Act where there is an element of doubt as to the commission of the offence for which an accused person is charged.

ACCOUNTING SCANDALS REPORTAGE AND WHISTLE BLOWING LEGISLATION

By

Bamson, Tamunoene Jones

Abstract

The paper examines accounting scandals reportage and whistle blowing legislation. An accounting scandal occurs anytime money is stolen or hidden by an employee or public official. Accounting scandals occurs when there is over-recording of sales revenue or when there is under-recording of expenses or when creative accounting practices are used to avoid fraudulent disclosures. Nigeria has had a lot of looting of funds and abuse of public offices. Therefore, there is the need for implementing a policy that encourages a culture where concerns are reported early so as to enable organizations to prevent fraudulent or harmful practices. The call by Transparency International for countries to have whistleblowing policy is a step in the right direction to expose mismanagement and misdeeds in the public or private sector in Nigeria. Based on this, there is the need for the enactment of appropriate legislations to regulate the whistleblowing policy in Nigeria. The paper concludes that accounting scandal reportage is the process of providing laws that could provide institutions and individuals the power to serve as watchdog by giving useful information to curb financial crime for public interest. The paper recommends that the Nigerian National Assembly should expedite action to enact a law that could guarantee whistle blowing in Nigeria. Next, the anti-corruption unit of the Nigerian Bar Association (NBA) should collaborate with the National Assembly of Nigeria so as provide the necessary red-lines that could enhance the whistle blowing policy in Nigeria.

Keywords: Accounting Scandals, Whistle Blowing Policy

Introduction

The need for legislations to govern whistleblowing is very important in carrying out anti-corruption crusade.¹ This is because not understanding the law surrounding whistleblowing can be costly for organizations in terms of potential claims as well as damage to reputation.² Essentially, whistleblowing occurs when concerns are raised by an individual to the management of an organization or a regulatory agency, about a workplace danger or illegality that affects others.³ Typically, raising concerns involves revealing information to prevent something bad.⁴ A wide variety of whistleblowers exist at any company.⁵ A big challenge is to determine which whistleblower complaints are meritorious and which are not.⁶ For whistleblowers whose complaints are in fact meritorious, they are a "litmus test" for the company's internal compliance health.⁷ But a whistleblower's information is only as valuable as the company's response to it.⁸ In reality, whistleblowers may be at risk for disclosing misdeeds in an organization, which may result to employer retaliation, industry blacklisting, legal

1. Bolanle Ogungbamila (2014). Whistleblowing and Anti-Corruption Crusade: Evidence from Nigeria, Retrieved on August 2, 2017. From: <http://www.cscanada.net/index.php/css/article/view/4680>
2. Richard J. Charney (nd). A global guide to whistleblowing laws. Retrieved on August 1, 2017, from: <http://www.nortonrosefulbright.com/knowledge/publications/120311/a-global-guide-to-whistleblowing-laws>
3. *Ibid*
4. *Ibid*
5. Stacey P. Slaughter (2014). 5 strategies to minimize whistleblower risk. Retrieved on August 2, 2017, from: <https://www.law.com/insidecounsel/2014/10/20/5-strategies-to-minimize-whistleblower-risk/?slreturn=20171018120740>
6. *Ibid*
7. *Ibid*
8. Oliver Benson (2014). The Risks of Being a Whistleblower. Retrieved on August 2, 2017, from: <https://www.orangewebsite.com/articles/risks-of-being-a-whistleblower/>

consequences professional violations.⁹ Consequently, in order to avoid these risks, legislations are required to protect whistleblowers by implementing a well-designed whistleblowing policy that works for the organization and keep it under review.¹⁰

Nigeria has had a lot of looting of funds and abuse of public offices.¹¹ Therefore, there is the need for implementing a policy that encourages a culture where concerns are reported early so as to enable organizations to prevent fraudulent or harmful practices.¹²

Therefore, this paper intends to provide a philosophical appraisal of accounting scandals reportage and whistle blowing policy in Nigeria. Consequently, to do this, the paper is divided into nine sections. The first section discusses the introduction. The second aspect deals on the philosophy of accounting scandal reportage and whistleblowing policy in Nigeria. The third part discusses fraud and the law. The fourth part discusses investigative journalism. The fifth part discusses whistle blowing policy. The next part discusses the need for investigative journalism and whistle blowing policy in Nigeria. This is followed by another part that gives an empirical review of accounting scandals. The eight part gives the conclusion, and the last section provides the recommendations.

9 Peter Jones (2014). Key steps to avoid whistleblowing problems at work. Retrieved on August 1, 2017, from: <https://www.personneltoday.com/hr/key-steps-avoid-whistleblowing-problems-work/>

10 *Ibid*

11 Briggs, D. & Bamson, T. J. (2012). Fraud Triangle Elements and White Collar Crime Among Civil Servants in Rivers State. *Trend Journal of Management and Social Sciences*, Vol. 5, No. 1., pp. 52

12 Bolanle Ogunbamila (2014). *Op. Cit*

The Philosophy of Accounting Scandal Reportage And Whistleblowing Policy In Nigeria

An accounting scandal occurs anytime money is stolen or hidden by an employee or public official; or when there is over-recording sales of revenue or when there is under-recording of expenses or when creative accounting practices are used to avoid fraudulent disclosures.¹³ Therefore, there is need for such scandals to be unraveled so as to prevent economic losses due to mismanagement and embezzlement of funds.¹⁴ Nigeria already has a freedom of information Act (FOIA) that guarantees free flow of information of public concern and interest.¹⁵ The FOIA is a legislation that guarantees the right to information within the control of public institutions to all Nigerians.¹⁶

Section 1 of the FOIA empowers a person to request information from a government institution whether he has a reason for requesting such information or not provided such information is not one excluded under the Act for national interest. This right is enforceable in court if the requested information is not provided within 7 days of making the request.¹⁷ The Act also makes it compulsory for public institutions to keep records of their activities.¹⁸ This is meant to enable public access to these records, thus encouraging transparency.¹⁹

Consequently, this Act could compliment the efforts of whistleblowing through the raising of alarm that could prevent ills

13 David Woodcock (2015). Accounting Fraud: Down, But Not Out, retrieved on August 2, 2017, from: <http://www.jonesday.com/files/Publication/>

14 *Ibid*

15 Matthew Osa Oghogho (2015). The Freedom of Information Act and its Impact on the Nigerian Polity. Retrieved on August 2, 2017, from: <http://nigerianlawtoday.com/the-freedom-of-information-act-and-its-impact-on-the-nigerian-polity/>

16 *Ibid*

17 17 Matthew Osa-Oghoghu (2015). *Op. Cit*

18 18 *Ibid*

19 19 *Ibid*

in the society.²⁰ Whistle blowing is a cardinal aspect for fighting corruption.²¹ The fight against corruption with the process of whistle blowing requires the use of whistleblowers.²² Whistleblowers are persons who informs on a person or organization regarded as engaging in an unlawful or immoral activity.²³ The act of whistleblowing may be risky and dangerous to whistleblowers.²⁴ Therefore, it is in the public interest that the law protects whistleblowers so that they can speak out if they find malpractice in an organization.²⁵ Similarly, accounting scandal reportage can be carried out as a watchdog to prevent corporate corruption.²⁶ This process could be effected through investigative journalism. Investigative journalism is a form of journalism in which reporters deeply investigate serious issues for the interest of the society.²⁷ The act of investigative journalism serves as a primary source of information for "watchdog reporting" or "accountability reporting" so as to provide commitment to public service.²⁸

Fraud And The Law

Fraud is a term which is commonly used to describe activities such as theft, corruption, conspiracy, embezzlement, money laundering,

20. 20 *Ibid*

21. 21 Ngozi Iheuba (2017). Whistle blowing: a pathway in the fight against corruption. Retrieved on August 19, 2017, from: <https://prnigeria.com/national/whistle-blowing-pathway-fight-corruption/>

22. 22 Bolanle Ogungbamila (2014). *Op. Cit*

23. 23 *Ibid*

24. 24 *Ibid*

25. 25 *Ibid*

26. 26 David Woodcock (2015). *Op. Cit*

27. 27 John Pilger (2005). The Introduction to Tell Me No Lies: Investigative Journalism and Its Triumphs, London: Vintage, Retrieved on August 23, 2017, from: <https://www.penguin.co.uk/authors/john-pilger/1007047/>

28. 28 Butch Ward (2005). Watchdog Culture: Why You Need it, How You Can Build it. Retrieved on August 20, 2017, from: <https://www.poynter.org/2005/watchdog-culture-why-you-need-it-how-you-can-build-it/67742/>

bribery and extortion.²⁹ Typically, fraud comes mainly with attributes of corruption.³⁰ Corruption causes mass poverty and inequality in a country. The implication of this is that development is stunted when corruption is prevalent³¹ The World Bank defines corruption as: The abuse of public office for private gains. Public office is abused for private gain when an official accepts, solicits or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit.

Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets or the diversion of state revenue³² In, Nigeria, the major laws that deal with corruption are: Economic & Financial Crimes Commission (EFCC) Establishment Act 2004; Independent Corrupt Practices & Other Related Offences Act 2000; Advance Fee Fraud and Other Related Offences Act 2006; Money Laundering (Prohibition) (Amendment) Act 2012; Miscellaneous Offences Act; and Code of Conduct Act. Others are the Nigerian Extractive Industries Transparency Initiative Act; Freedom of Information Act 2011; Fiscal Responsibilities Act 2010; Penal Code Laws of Federation of Nigeria 2004; Criminal Code Law of Federation of Nigeria 2004; Banks and Other Financial Institutions (Amendment) Act 1991 and Failed Banks (Recovery of Debts) and Financial

29. 29 David Woodcock (2015). Accounting Fraud: Down, But Not Out, <http://www.jonesday.com/files/Publication/b87ff342-d09c-42b2-a876-467eb55829fc/Presentation/PublicationAttachment/0862f628-d21e-4b7c-b7d0-47efca5f468d/Accounting%20Fraud%20Down%2C%20But%20Not%20Out.pdf>

30. 30 Briggs, D. & Bamson, T. J. (2012). *Op. Cit.*, p. 53

31. 31 Briggs, D. & Bamson, T. J. (2013). Financial Fraud Management and Internal Control of Small Companies: An Empirical Analysis. *African Business and Finance Journal*, Vol. 6, No. 2, June, p. 45

32. 32 The World Bank Group (2016). Beyond Economic Growth. Retrieved on August 20, 2017, from: http://www.worldbank.org/depweb/english/beyond/beyondco/beg_01.pdf

Malpractices in Banks (Amendment) Act 1994³³. Fraud law deals with crimes and civil tort actions that address situations in which a person wrongfully obtains money, property, or other benefits by deceit.³⁴ In the legal parlance, fraud is typically charged as a felony, meaning that a conviction can result in a year or more of incarceration.³⁵ Proving fraud can be difficult, even for government prosecutors with entire investigative agencies at their disposal.³⁶ The difficulty is not establishing that the victim suffered a loss.³⁷ Financial records are usually available to prove this element.³⁸ However, with laws put in place, the laws could serve as effective instruments that could curb criminality because of the punitive measures that they control.³⁹ For instance, Nigeria is ranked 136th as a corrupt country in 2015 out of 168 countries surveyed by TI. It was rated 136th out of 175 in 2014, 144th in 2013 out of 177, 139th out of 176 in 2012, and 143rd in 2011 out of 183 countries. Nigeria is currently ranked 136th out of 168 countries on the Transparency International Corruption Perception Index compiled in 2015.⁴⁰

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33. Ibidopalo Bolu, S.P.A Ajibade & Co. (2016). Nigeria: The Anti-Corruption Legal Framework And Its Effect On Nigeria's Development. Retrieved on August 22, 2017, from: <http://www.mondaq.com/Nigeria/x/490434/White+Collar+Crime+Fraud/The+AntiCorruption+Legal+Framework+And+Its+Effect>
34. *Ibid*
35. Briggs, D. & Bamson, T. J. (2013). *Op. Cit*
36. *Ibid*
37. *Ibid*
38. *Ibid*
39. Bamson, T. J. (2016). "Combating Public Procurement Fraud in Nigeria: An Analysis of Law, Ethical Practices and Due Process Mechanism." *Nigerian National Human Rights Commission Journal*. December 2016, Vol. 6. P. 55
40. *Ibid*

Investigative Journalism

Over the years, Nigeria has been embarrassed severely as one of the most corrupt countries in the world.⁴¹ No one would forget in a hurry- the term “fantastically corrupt country” used to describe Nigeria.⁴² However, corruption is everywhere. There is no country in the world where corruption does not exist.⁴³ The causes, perception and tendency to engage in corrupt practices only varies from one country to another as seen in the Corruption Perceptions Index, usually issued by the international anti-corruption organization, Transparency International (TI).⁴⁴

Nigeria's media needs to be responsive and proactive in providing reportage on critical societal issues, especially, those that has to do with corruption and fraud. This is because the media is the mouth piece of the society.⁴⁵ Investigative journalism is the art of disclosing issues for the interest of the public. It involves an investigative reporting process that carries out the following: first, the analysis of documents, such as lawsuits and other legal documents, tax records, government reports, regulatory reports, and corporate financial filings. Second, the analysis of the databases of public records; third, the investigation of technical issues, including scrutiny of government and business practices and their effects as well as research into social and legal issues.⁴⁶ The essence of all these are to uncover and document things not known to the public.

41. 41 Taiwo George (2016). Cameron describes Nigeria as a 'fantastically corrupt' country during meeting with Queen. Retrieved on August 18, 2017, from: <https://www.thecable.ng/cameron-describes-nigeria-fantastically-corrupt-country-meeting-queen>

42. *Ibid*

43. Michael Jegede (2016) Supporting Buhari's war against corruption. Retrieved on August 18, 2017, from: <http://thenews-chronicle.com/supporting-buharis-war-against-corruption/>

44. *Ibid*

45. Emily Motill (2014). Types of Investigative Journalism Throughout History. Retrieved on August 17, 2017, from: <https://emilymotill.wordpress.com/2014/10/23/types-of-investigative-journalism-throughout-history/>

46. *Ibid*

Practically, the advantage of investigative journalism, it that is allows the journalists to check on the government and the society. However, original investigate journalism can give the journalist too much power, and cause them to try to find bad things when there is not. Thus, there is need for laws on to control investigative journalism. This brings the issue of freedom of information law to the bear. Freedom of Information means walking into any government ministry or and government establishment requesting to view certain Information like contracts awarded and tenders etc.⁴⁷ In Nigeria, the Freedom of Information Act was enacted on the 28th day of May 2011.⁴⁸

The Act was enacted to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences of disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.⁴⁹

Freedom of Information legislation comprises laws that guarantee access to data held by the state.⁵⁰ They established a "right to know" legal process by which requests may be made for government-held information, to be received freely or at minimal cost barring standard exceptions. Also referred as open records governments are also typically bound by a duty to publish and promote openness.⁵¹ In many countries there are constitutional guarantees for the right to access to information but usually these

47 *Ibid*

48 Emmanuel Uwazie Anyanwu, Dr. Mrs. Pearl Akanwa & Oyemike Victor Ossai-Onah (2013). Freedom of Information Bill, Its Relevance and Challenges in National Development: The Nigerian Experience. *Library Philosophy and Practice (e-journal)*. 1030

49 *Ibid*

50 Emmanuel Uwazie Anyanwu, Dr. Mrs. Pearl Akanwa & Oyemike Victor Ossai-Onah (2013). *Op. Cit*

51 *Ibid*

are unused if specific support legislation does not exist. A basic principle behind most freedom of information legislation is that the "Burden of proof" falls on the body asked for it.⁵² Freedom of Information guarantees the right of an unhindered access to public Information Including Information held by all Federal government branches and agencies, as well as private institutions in which any Federal, State or Local government has controlling interest and those private institutions performing public functions.⁵³ In addition the freedom of information required these Institutions to take unilateral steps to become more transparent as part of this provision, the institutions will be required to make public data on the programmes and functions of their divisions, internal manuals used by employees in executing their functions, their finances and their names, title and income of all their employees⁵⁴ Truly, exposing practices that lead to widespread accounting scandals that potentially affect the society is part of the media's role as watchdog. This is because, a crucial duty of a journalist is to serve the public interest by acting as a watchdog on government and business. This duty has become all the more important at a time when governments are restricting the flow of information. At such times, broadcast and print journalists must redouble their efforts to use freedom-of-information laws to obtain public documents and help the public appreciate the value of such laws. Specifically, the real essence of journalism is the search for truth and the main duty of journalist is to report unadulterated truth to the public. Investigative journalism involves exposing corruption in high places and peering into neglected corners of society. Investigative journalism serves as a watchdog on society and its institutions, whether in Government, business or the judiciary.⁵⁵

52 *Ibid*

53 *Ibid*

54 *Ibid*

55 Burgh, Hugo de, (2000), investigative journalism, london; Routledge

Whistle Blowing Policy

Whistle blowing policy connotes the reporting by employees of suspected misconduct, illegal acts or failure to act within the government.⁵⁶ The aim of this policy is to encourage employees and others who have serious concerns about any aspect of their organization's work to come forward and voice those concerns.⁵⁷ The essence of the whistle blowing policy is to encourage whistleblowers to report evident violations; the law enables whistleblowers to recover back pay, back benefits, emotional distress damages, punitive damages, civil penalties, attorney's fees, and litigation costs.⁵⁸

In Nigeria, the Federal Government provided the whistle blowing policy in a bid to curb corruption, mismanagement of public funds and financial malpractice as well as encourage compliance with financial regulations through the Federal Ministry of Finance (FMF).⁵⁹

Specifically, the Federal Ministry of Finance Whistle-Blowing Programme (FMF- WBP) is aimed at encouraging anyone with information about a violation of financial regulations, mismanagement of public funds and assets, financial malpractice, fraud and theft to report it. Whistle-blowing, in the simplest of terms, means providing information about any illegality, usually for the purpose of protecting the public interest.⁶⁰ The FMF has defined a whistleblower as a person who voluntarily discloses to the Federal

56. Justin D. Cummins (2017). The law continues to reward whistleblowers who fight fraud. Retrieved on August 29, 2017, from: <https://www.cummins-law.com/blog/2017/06/law-continues-reward-whistleblowers-fight-fraud/>

57. *Ibid*

58. *Ibid*

59. Federal Ministry of Finance FMF - WHISTLE BLOWING Frequently Asked Questions (FAQs) Retrieved on August 29, 2017, from: http://whistle.finance.gov.ng/_catalogs/masterpage/MOFWhistle/assets/FMF%20WHISTLEBLOWING%20FREQUENTLY%20ASKED%20QUESTIONS.pdf

60. *Ibid*

Government of Nigeria, through the Federal Ministry of Finance, a possible misconduct or violation that has occurred, is ongoing, or is about to occur with specific concerns which are in the public interest. Information on impropriety in the dealing or use of public funds or property, theft or corruption is acceptable by the FMF; it is particularly useful if such information is in the public interest. Information pertaining to personal grievances concerning private contracts is expressly excluded.⁶¹ Information could be submitted anonymously.⁶² If a whistleblower does not wish to reveal his identity, he can do so, and there would be no record whatsoever of his identity.⁶³ Even if he chooses to disclose his identity, the utmost confidentiality would be maintained and his identity would not be disclosed, except in circumstances stipulated by law.⁶⁴

A whistleblower is expected to submit his information with evidence, if he has any, and with as much precision and specifics as to dates, time, events and persons involved in order to aid proper investigation.⁶⁵ A whistleblower has no criminal or civil liability and would not be subjected to disciplinary action of any kind for supplying information which turns out to be untrue if, at the time of supplying such information, he had reasonable belief that the information provided was substantially true beyond reasonable doubt and if his concerns were raised in public spirit and good faith.⁶⁶

However, if it is discovered that a whistleblower intentionally supplied false and misleading information or made malicious claims, he stands the risk of being prosecuted after an investigation is conducted.⁶⁷ A whistleblower is entitled to a reward of about 2.5% - 5% of the amount recovered if he provided the Government with information that directly led to the voluntary return of stolen or

61 *Ibid*

62 Federal Ministry of Finance, *Op. Cit*

63 *Ibid*

64 *Ibid*

65 *Ibid*

66 *Ibid*

67 *Ibid*

concealed public funds or assets; provided the information is one that the Government does not already have and which it could not have obtained from any other publicly available source.⁶⁸

The whistleblower would only get rewarded if the money is recovered on account of the information supplied by him.⁶⁹ The FMF-WBP assures stakeholders that if they whistle blow in public spirit and good faith, regardless of whether the information provided is used, they will be protected and where a whistleblower is victimized or where he suffers adverse treatment in retaliation for whistle blowing, he can file a formal complaint with a panel of inquiry which shall be set up to handle such complaints.⁷⁰

If upon further investigation, it is discovered that a whistleblower has suffered some kind of retaliatory treatment for whistle blowing, disciplinary actions shall be taken against the perpetrators of such act and restitution shall be made to the victim for any loss suffered.⁷¹

As laudable as the Whistle blowing programme is, its shortcoming lies in the fact that it is not backed by any law, a fact which could create problems.⁷² There is no law in place to legally define the framework of the whistle blowing policy in Nigeria, there is also no law to provide adequate protection for whistleblowers and vest them with a right to redress in the event of any victimization.⁷³ There is no law to compel the Government to pay Whistleblowers the stipulated reward due them in the unfortunate event that the government fails or refuses to give the stipulated reward.⁷⁴ The fact that the reward payable to Whistleblowers is not specifically stated may pose some problems (how do we determine what percentage would be paid to whistleblowers when the policy merely states that

68 *Ibid*

69 *Ibid*

70 *Ibid*

71 Federal Ministry of Finance, *Op. Cit*

72 *Ibid*

73 *Ibid*

74 *Ibid*

it is between 2.5 % and 5%).⁷⁵ The courts have stated that "A policy statement or guideline by the Federal Government does not give rise to a contractual relationship between the Government and a third party; and its non-implementation does not entitle the third party to a legal redress against the Government."⁷⁶ If for any reason the Government fails to uphold its side of the bargain, the Whistleblower would be left with no remedy. It is for this reason that it is highly desirable to have in place a Whistle blowing Law.⁷⁷

The Need For Investigative Journalism And Whistle Blowing Policy In Nigeria

The need to fight corruption proactively is seen as hope to save countries from collapse. Essentially, removing the cancer of corruption from the system is the key not only to restoring the moral health of a nation and to promote socio-economic development.⁷⁸ Transparency International defines corruption as the "abuse of entrusted power for private gain. Thus, every country strives to curb corrupting."⁷⁹

This is because, countries are obligated to take anti-corruption measures in public and private sectors. These can include establishing anti-corruption bodies and enhancing transparency in political financing. States must take measures to ensure public services are subject to safeguards that promote transparency, efficiency and merit-based recruitment. Public servants should be subjected to codes of conduct, financial disclosures and disciplinary measures. Transparency and accountability in public finance must be promoted, and specific anti-corruption requirements, especially

75 *Ibid*

76 WILKIE v. FGN & ORS (2017) LPELR-42137(CA). Retrieved on August 29, 2017, from: <https://www.proshareng.com/news/Frauds.../Whistle-Blowing-Policy...-/33720>

77 *Ibid*

78 Briggs, D. & Bamson, T. J. (2013). *Op. Cit*

79 Transparency International. What is Corruption? Retrieved on August 29, 2017, from: <https://www.transparency.org/what-is-corruption/>

in the judiciary and in public procurement, must be established. Transparency and accountability are meant to promote good governance and to prevent corruption.⁸⁰

Nigeria has anti-corruption agencies and laws; however there seems to be a complete lack of political will to strengthen these agencies and to faithfully enforce the laws.⁸¹ The freedom of information Act and Whistle Blowing Policy are essential to uncover hidden and serious corrupt activities for the benefits of the citizens. Specifically, the freedom of information Act has promoted investigative journalism to serve as a watchdog in order to inform the public about happenings in institutions and society, especially in circumstances where a significant portion of the public would demand changes in response. Investigative journalism serves as a watch dog action and it involves fact-checking statements of public officials. The essence of investigative journalism is to interview public figures and challenge them with problems or concerns and produce report from the information gathered from the public figures about particular issue. Essentially, in order to promote good governance, the citizens have the right to know what is happening in Public institutions. Thus, whistleblowing becomes a formidable tool to alert the public on positive and negative occurrences in the public institutions in order to aid the recovery of looted public funds through the timely provision of information to curb corrupt activities.⁸²

Typically, a whistleblower gives information of fraud or immoral act of the company to the employer or other parties, like the government. Whistleblowers can be employees, vendors, contactors, customers or the general public. Whistleblowers can be internal or external to an organization.⁸³ Internal whistleblowers are employees who discover misconduct in the workplace and communicate this to their supervisor, who then follows established

80 *Ibid*

81 Bamson, T. J. (2016). *Op. Cit*

82 Federal Ministry of Finance, *Op. Cit*

83 Justin D. Cummins (2017). *Op. Cit*

procedures to address the misconduct within the organization. External whistleblowers are employees who discover corporate misconduct and choose to bring it to the attention of external parties, such as law enforcement agencies or the media. The need to strengthen whistle blowing policy with laws aimed at protecting whistle blowers is essential.⁸⁴

Practically, laws have been successfully enacted in many countries. For instance, in the United States of America, the Whistleblower Protection Act of 1989, as amended, protects federal whistleblowers who work for the government and report agency misconduct.⁸⁵ Secondly, in the United Kingdom, the Public Interest Disclosure Act 1998⁸⁶ is enacted to protect whistleblowers from detrimental treatment by their employers. Similarly, in India, the 2011 Whistle Blowers Protection Act⁸⁷ provides a mechanism to investigate alleged corruption and misuse of power by public servants and also protect anyone who exposes alleged wrongdoing in government bodies, projects and offices. Apart from whistle blowing policy, investigative journalism with some elements of accountability reporting is essential to expose fraud. Accountability reporting involves the provision of accounts of stewardship to expose the negative and, or positive roles of management.⁸⁸ The simplest form of accountability is the requirement for an administrative organization to render an account of what it has done. The report is meant to be made to some auditors, independent organization, legislatures, or the public at large, through a published

84 *Ibid*

85 United States of America, the Whistleblower Protection Act of 1989, as amended

86 The United Kingdom, the Public Interest Disclosure Act 1998

87 India, the Whistle Blowers Protection Act of 2011

88 Bamson, Tamunoene Jones Accounting Scandals Reportage and Whistle Blowing Legislation

report, so that the assessment can be reasonably public and objective.⁸⁹

Empirical Review of Accounting Scandals

Fraudulent accounting practices occur in public bodies, but they are usually identified by internal auditors. Thus, auditors are expected to expand their audit programs to report fraudulent and corrupt activities. Based on this, the whistle blowing policy was made to expose fraud. Some studies on accounting scandals are discussed here. A study by Salaudeen, Ibikunle and Chima in 2015⁹⁰ on Unethical Accounting Practice and Financial Reporting Quality: Evidence from Nigeria, conclude that corporate failure are combined effect of failure in corporate governance and financial reporting as well as unethical practice on the part of professional accountants. A report by Oluwagbuyi Olusola Luke and Olowolaju Monisola in 2013⁹¹ on Incessant Financial Scandals in the Corporate Organizations in Nigeria: Auditors' Culpability concluded that there is significant relationship between the serving period of an audit firm and the opinion of the auditors. The finding also led the researchers to conclude that good track record of an audit firm to the best practices is significant.⁹² The researchers also revealed that the fee accepted to offer an audit firm by the client can significantly affect their report.⁹³ The researchers also disclosed that auditors have significant roles to perform in preventing organisation

89 B. Guy Peters. "Accountability". Retrieved on August 31, 2017, from: <http://siteresources.worldbank.org/PSGLP/Resources/PerformanceAccountabilityandCombatingCorruption.pdf>

90 Yinka M. Salaudeen, Jide Ibikunle & Emmanuel IB Chima (2015). "Unethical Accounting Practice and Financial Reporting Quality: Evidence from Nigeria" *International Journal of Academic Research in Accounting, Finance and Management Sciences*, Vol. 5, No.2, April 2015, pp. 143-150

91 Oluwagbuyi Olusola Luke & Olowolaju Monisola (2013) "Incessant Financial Scandals in the Corporate Organizations in Nigeria: Auditors' Culpability", *Research Journal of Finance and Accounting*, Vol.4, No.9., pp. 1-7

92 *Ibid*

93 *Ibid*

failure.⁹⁴ Also the findings of the researcher showed that non-audit fees which come as a result of accepting other services apart from the audit engagement in an organisation have a significant adverse effect on the jobs of the auditors.⁹⁵ In addition, the findings noted that reliance on audit report is important in order to develop organisations financially⁹⁶. This is because, it allows the stakeholders in organisations⁹⁷ to know the true financial muscles of the organization. Finally, Auditors report is expected to reveal the objectivity, fairness and integrity of the managers and the management in the preparation of the financial records of corporate organisations.⁹⁸

Research by Nousheen Tariq Bhutta and Muhammed Mohtsham Saeed (2011) on "Accounting scandals in the context of corporate social reporting (CSR)" reveals that CSR should be adopted for giving information to public about the accounting scandals.⁹⁹ A study by Agrawal in 2005¹⁰⁰ on Corporate Governance and Accounting Scandals reveals that several key governance characteristics are unrelated to the probability of a company restating earnings. These include the independence of boards and audit committees and the provision of non-audit services by outside auditors. The research found that the probability of restatement is lower in companies whose boards or audit committees have an independent director with financial expertise;¹⁰¹ but, it is higher in companies in which the chief executive officer belongs to the

94 *Ibid*

95 *Ibid*

96 *Ibid*

97 *Ibid*

98 *Ibid*

99 Mohtsham Saeed (2011). Accounting scandals in the context of corporate social reporting, *Journal of Database Marketing & Customer Strategy Management*, September, Volume 18, Issue 3, pp 171-184

100 Agrawal, A. (2005) *Corporate Governance and Accounting Scandals*. Retrieved on August 31, 2017 from: https://www.researchgate.net/publication/24101156_Corporate_Governance_and_Accounting_Scandals.

101 *Ibid*

founding family.¹⁰² The research was also consistent with the idea that independent directors with financial expertise are valuable in providing oversight of a firm's financial reporting practices.¹⁰³

Conclusion

No country can fight corruption to a halt. Combating corruption is an ongoing and deliberate process. Success depends on the action of government and the larger society and collective anticorruption strategies. The Nigeria Government has anticorruption agencies such as Economic and Financial Crimes Commission (EFCC); Independent Corrupt Practices and Commission, and the Code of Conduct Bureau. However, the presence of these agencies could not adequately eradicate corrupt acts. There are no best practices for curbing corruption. In accounting, internal control systems, activities of auditors, forensic and investigative auditors could not adequately eradicate corruption. Thus, the application of investigative journalism to provide reportage as a watchdog and accountability reporting as well as whistle blowing is very vital. These processes could also assist in exposing the crime of fraud in the society.

A part from this, a lot of public office holders take oath of office so as to give stewardship through accountability and transparency. Transparency and accountability are critical for the efficient functioning of a society. Accountability is conceptualized in terms of responsibility. It involves carrying out official duties in line with the law or a code of ethics. The concept of responsibility relies more on the internalized values of public servants and their understanding of the law and appropriate behavior in office. Transparency implies openness, communication and accountability. It is a metaphorical extension of the meaning a "transparent" object is one that can be seen through. With regard to the public services, it means that holders of public office should be as open as possible

102 *Ibid*

103 *Ibid*

about all the decisions and actions they take. Thus, it could be concluded that accounting scandal reportage is the process of providing laws that could provide institutions and individuals the power to serve as watchdog by giving useful information to curb financial crime for public interest. Whistle blowing implies the proactive means for creating alert to expose financial crimes and other forms of corruption. Fraud is an ongoing reality. In the fight of fraud and corruption, no country has escaped criticism with regard to transparency and accountability. This is because public officials and managers, who are saddled with the provision of public trust in the administration of public institutions and management of businesses abuse the trust confided in them. Over the years, internal control systems, auditing and investigation has not fully solved the problem of combating financial frauds and scandals. Thus, it is high time accounting scandals are exposed by the use of effective accountability reporting processes through the practice of investigative journalism. Investigative journalism serves as a watchdog to reveal hidden crimes for the interest of the public. In addition, the incessant looting of funds in Nigeria is very alarming; therefore, the application of the whistle blowing policy could serve as a means to aid the recovery of looted public funds through the provision of timely information to proactively combat corrupt activities.

Recommendations

Fraud is an ongoing reality. In the fight of fraud and corruption, no country has escaped criticism with regard to transparency and accountability. Consequently, based on the analysis from this study, the following recommendations are suggested. Firstly, the Nigerian National Assembly should expedite action to enact a law that could guarantee whistle blowing in Nigeria. Secondly, the anti-corruption unit of the Nigerian Bar Association should collaborate with the National Assembly of Nigeria so as provide the necessary red-lines that could enhance the whistle blowing policy in Nigeria. Thirdly, the public and politicians should not use whistle blowing policy as a

process to witch-hunt managers and public office holders. Next, the public should be enlightened on how to become whistle blowers so as to expose corrupt activities before they become too hard to tackle. Lastly, corporate bodies and public institutions should be encouraged to have whistle blowing policy in Nigeria.

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